Supreme Court, U.S.
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IN THE

**SUPREME COURT OF THE UNITED STATES**

October Term, 1997

No. 97-

ALASKA CENTER FOR THE ENVIRONMENT,
ALASKA WILDLIFE ALLIANCE,
TRUSTEES FOR ALASKA,
*Petitioners,*

v.

CARL S. ARMBRISTER, Director, Office of Planning and Program Development, Region 10, Federal Highway Administration,
FEDERAL HIGHWAY ADMINISTRATION,
ALASKA VISITORS ASSOCIATION,
CHUGACH ALASKA CORP.,
PRINCE WILLIAM SOUND ECONOMIC DEVELOPMENT CORP.,
ALASKA STATE DISTRICT COUNCIL OF LABORERS,
STATE OF ALASKA,
*Respondents.*

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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135 pp

## QUESTION PRESENTED

Can the Federal Highway Administration (FHWA) authorize construction of a road through parkland specifically protected from roads by Section 4(f) of the Department of Transportation Act, without finding, as required by *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), that there is no feasible and prudent alternative?

## PARTIES TO THE PROCEEDING

The parties are:

Petitioners:

Alaska Center for the Environment
Alaska Wildlife Alliance
Trustees for Alaska

Pursuant to Supreme Court Rule 29.6, Petitioners state that they have no parent companies or subsidiaries.

Respondents:

Carl S. Armbrister, Director, Office of Planning and Program Development,
Region 10, Federal Highway Administration
Federal Highway Administration
Alaska Visitors Association
Chugach Alaska Corp.
City of Whittier
Alaska State District Council of Laborers
Prince William Sound Economic Development Corp.
State of Alaska

## TABLE OF CONTENTS

QUESTION PRESENTED. ..... i

PARTIES. ..... ii

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

STATUTES INVOLVED ..... 1

STATEMENT OF THE CASE ..... 1

LEGAL BACKGROUND ..... 2

FACTUAL BACKGROUND ..... 4

PROCEEDINGS BELOW ..... 8

REASONS FOR GRANTING THE WRIT ..... 8

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH *OVERTON PARK*. ..... 9

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH OTHER CIRCUIT COURTS. 11

CONCLUSION ..... 12

## TABLE OF AUTHORITIES

### Cases

*Alaska Center for the Environment v. Armbrister*, 131 F.3d 1285 (9th Cir. 1997) ..... 1

*Beaulieu v. United States*, 497 U.S. 1038 (1989) ..... 14

*Coalition on Sensible Transportation v. Dole*, 826 F.2d 60 (D.C. Cir. 1987) .. 13

*Committee to Preserve Boomer Lake Park v. Dep't. of Transportation*, 4 F.3d 1543 (10th Cir. 1993) ..... 13

*Druid Hills Civic Ass'n. v. Federal Highway Administration*, 772 F.2d 700 (11th Cir. 1985) ..... 13

*Hickory Neighborhood Defense League v. Skinner*, 893 F.2d 58, *after remand*, 910 F.2d 159 (4th Cir. 1990) ..... 13

*Monroe County Conservation Council v. Adams*, 566 F.2d 419 (2nd Cir. 1977) .. 12

*Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)* ..... passim

*Van Abbema v. Fornell*, 807 F.2d 633 (7th Cir. 1986) ..... 11

*Yee v. Escondido*, 503 U.S. 519 (1992) . 14

## Statutes

23 U.S.C. § 138 ..... 1, 2, 3
28 U.S.C. § 1254(1) (1993) ..... 1
28 U.S.C. § 1331. ..... 9
49 U.S.C. § 303 (1997) ..... 1
49 U.S.C. § 303(a) ..... 3
49 U.S.C. § 303(c) ..... 3

## Other Authorities

112 Cong. Rec. 17,631 (1966) ..... 3
114 Cong. Rec. 24,032-33 (1968) ..... 3
*Comment, Department of Transportation's Section 4(f): Paving the Way Toward Preservation,* 36 Am. L.Rev. 633 (1987) 4
S. Rep. No. 1340, 90th Cong., 2d Sess... 3

## Rules

Supreme Court Rule 10 ..... 10, 14
Supreme Court Rule 13. ..... 1

Alaska Center for the Environment, *et al.*, hereby petition this Court for issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered in this case on December 15, 1997.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Alaska Center for the Environment v. Armbrister,* 131 F.3d 1285 (9th Cir. 1997)and is reprinted in the Appendix at 1-15. The decision of the United States District Court for the District of Alaska, which is not reported, is reprinted in the Appendix at 17-34. The original agency decision is reprinted in the Appendix at 35-54.

## JURISDICTION

The Ninth Circuit entered the opinion of which review is sought on December 15, 1997. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1993) and Supreme Court Rule 13.

## STATUTES INVOLVED

Department of Transportation Act, 49 U.S.C. § 303 (1997)

Federal-Aid Highway Act, 23 U.S.C. § 138 (1990)

## STATEMENT OF THE CASE

The case presents the strictly legal question of whether the Federal Highway Administration can fund the construction of a road through parkland without finding that an alternative project which avoids the parkland (an "avoidance alternative") entails unique problems, truly unusual factors, or cost or community disruption of extraordinary magnitude. Specifically, can FHWA reject a rail shuttle project that avoids parkland, and fund a road through the parkland, solely because more people would drive their cars on the road than would ride the rail shuttle? An affirmative answer would eviscerate Section 4(f) of the Department of Transportation

Act, which prohibits the construction of transportation projects in parkland except in the most extraordinary circumstances. The Ninth Circuit's decision conflicts with this Court's decision in *Overton Park* and with the decisions of several other Circuits.

This case carries significant implications for the Portage Glacier and Portage Lake Recreation Areas, extremely popular visitor attractions in Alaska, and for a national treasure, Prince William Sound. The case is also of national significance because the Ninth Circuit's opinion undermines the protection that Section 4(f) affords to all national parks, recreation areas, wildlife refuges, and other prized lands, many of which are located within the Ninth Circuit's jurisdiction.

## LEGAL BACKGROUND

Prior to the enactment of Section 4(f) in 1966,[1] federal and state highway departments often planned transportation projects on the basis of cost and convenience, with little regard for environmental impact. It was cheaper to build through parklands because the public landowners, unlike private landowners, did not have to be compensated for use of the land. *E.g.*, 114 Cong. Rec. 24,032-33 (1968) (remarks of Sen. Metcalf) (noting that local officials often built highways through parks or historic areas to save money); 112 Cong. Rec. 17,631 (1966) (statement of Sen. Yarborough) (noting numerous losses of parks and historic resources due to highway construction).

Congress became increasingly alarmed at the loss of and damage to parklands due to highway construction nationwide, and in response, declared in Section 4(f) a national policy that "special effort should be made to preserve the natural beauty of the countryside and public

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[1] 82 Stat. 824. Congress enacted similar language in the Federal Aid Highway Act of 1968, 23 U.S.C. § 138, and the two statutes are commonly referred to as "Section 4(f)."

park and recreation lands." 49 U.S.C. § 303(a); *see also* S. Rep. No. 1340, 90th Cong., 2d Sess. 18-19, *reprinted in* 1968 U.S. Code Cong. & Admin. News 3482, 3500 (emphasizing that everything possible should be done to preserve parklands and historic sites from destruction or damage resulting from highway construction). Section 4(f) prohibits the construction of roads through parkland unless there is no feasible and prudent alternative. 49 U.S.C. § 303(c); *see also* 23 U.S.C. § 138.

It was not long before a challenge to this environmentally protective statute reached the U.S. Supreme Court. *Overton Park* involved a proposed high-speed expressway through a 342-acre city park in Memphis, Tennessee. 401 U.S. at 406. Just as in this case, the U.S. Department of Transportation approved the project without explaining why it felt that there were no feasible and prudent alternative routes. *Id.* at 408.

This Court held that Section 4(f) required just such an explanation. In a landmark holding, the Court found Section 4(f)'s conservation purpose dictated that "protection of parkland is to be given paramount importance," *id.* at 412-13, and underscored that agencies must not sacrifice such prized lands for roads based on routine considerations of cost, directness of route, and community disruption which apply to all highway projects. The Court found that Section 4(f) constitutes a "plain and explicit bar" to the construction of highways through parkland, except in the most unusual situations. 401 U.S. at 411.

Accordingly, the Secretary may not fund a transportation project which uses parkland despite the presence of an alternative project which avoids parkland unless there are "truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reach[es] extraordinary magnitudes." *Id.* at 413 (emphases added). This holding has formed a pillar of environmental protection for parkland for the last 27 years. *See Proposed Highway Construction Through Overton Park, Memphis,*

*Tenn., Hearing Before the Subcomm. on Transp. of the Senate Comm. on Env't and Public Works,* 95th Cong., 2d Sess. at 22 (1978) (statement of William Futrell, Sierra Club President) (recognizing *Overton Park* as one of the Court's most important decisions this century); *see also Comment, Department of Transportation's Section 4(f): Paving the Way Toward Preservation,* 36 Am. L.Rev. 633, 635-36 (1987) (stating that Section 4(f) represents "one of the strongest substantive environmental laws in existence today.").

USDOT regulations restate the *Overton Park* interpretation of Section 4(f) as follows:

> Supporting information must demonstrate that there are unique problems or unusual factors involved in the use of alternatives that avoid [Section 4(f)] properties or that the cost, social, economic, and environmental impacts, or community disruption resulting from such alternatives reach extraordinary magnitudes.

23 C.F.R. § 771.135(a)(2).

In accordance with *Overton Park,* several Circuit Courts of Appeals have held that federal agencies must demonstrate truly unusual factors or extraordinary costs or community disruption associated with an avoidance alternative before funding a road or other transportation project which uses parkland. *See* section II, *infra.*

## FACTUAL BACKGROUND

FHWA and Intervenor-Appellee Alaska Department of Transportation and Public Facilities (ADOT) have decided to construct a $60 million road from Portage, Alaska, through two protected Recreation Areas to the town of Whittier, on the shores of western Prince William Sound. FHWA and ADOT expect that the vast majority of people who will visit western Prince William Sound are recreators who would travel during the summer months.

The state-owned Alaska Railroad Corporation (Alaska Railroad) provides the existing overland access to Whittier and western Prince William Sound. App. 59-66. Travelers board the train in Portage, and are transported approximately twelve miles through spectacular scenery including ice-capped mountain peaks and pristine valleys, before reaching Whittier and Prince William Sound. App. 65-66. The trip includes passage through two tunnels, which further adds to the unique nature of the experience. App. 65-66.

Many members of the public, particularly recreators, value the unique and enjoyable rail shuttle, App. 65-66, and a majority of riders who commented on the project are opposed to replacing the shuttle experience with a road which will degrade the Recreation Areas, and dramatically impact Prince William Sound. ADOT projects that the enormous increase in visitorship that the road will induce will cause significant increases in recreational boating and sportfishing, hunting, hiking, and camping. App. 67-71; 73-75. Western Prince William Sound is already at or near capacity for many of these activities,[2] and ADOT acknowledges that the road will have "major" impacts on the quality of the wilderness recreation experience in the Sound. ER 88.[3]

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[2] App. 84 (projecting an increase of more than 600 percent in recreation and sport fishing boats per day in Prince William Sound bays near Whittier by 2015); App. 67-68 (noting that goats are currently taken at maximum capacity, deer at near-maximum capacity, and that brown bears are currently over-hunted and in decline); App. 74-75 (noting that the rapid increase in visitation could leave agencies unprepared, and that impacts to fish and wildlife could be major).

[3] A significant portion of western Prince William Sound is included within the Port Nellie Juan-College Fiord Wilderness Study Area, which is managed by the U.S. Forest Service as a wilderness area. App. 88-89. The major

As an alternative to the road, FHWA and ADOT also considered an improved rail shuttle option, which would not be constructed through any property protected by Section 4(f). App. 92-96. Under this alternative, access between Portage and Whittier would be significantly improved by replacing the existing, somewhat antiquated train with two new locomotives, which would likely make hourly trips in each direction from 6:00 a.m. to 11:40 p.m. during summer, and eight round trips daily during winter. App. 92, 96-97. The agencies projected that visitation to Whittier wold increase six-fold by 2015 if the improved shuttle were implemented. This would constitute a dramatic increase in the level of service and visitation compared to the existing shuttle, while minimizing the adverse environmental impacts of transporting visitors. *Compare* App. 90-91 (discussing existing shuttle) *with* App. 92-99 (discussing improved shuttle).

In addition to the new train sets and operating schedules, the improved rail option would involve the construction of six loading platforms to replace the existing two, with parking lot improvements and amenities added in both Portage and Whittier. App. 93-94. With an automatic block signaling system, automated tunnel doors and ventilation systems, and new guard rails, the improved shuttle would be "as safe as any rail operation in the world." App. 106. ADOT estimated the cost of the improved rail option at $27.5 million, less than half the construction cost for the road. App. 99. ADOT further estimated the cost of a round trip ticket for an individual without a car at $8 ($5 in winter), App. 101-02 (51 per cent reduction from current $16 fare ($10 in winter)), comparable to the $12 cost per car for road access. App. 103-04.

Despite its favorable construction and user cost attributes, increased convenience, and unquestionably safe nature

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impacts for wilderness recreators include "displacement" or denial of the desired wilderness experience. App. 79-80.

compare to auto travel, ADOT repeatedly portrayed the improved shuttle project as unreasonable. *See* App. 107-111 (FHWA's discussion of ADOT's unfounded criticisms of the improved shuttle). During the administrative process, FHWA noted ADOT's excessive bias in favor of the road alternatives, and that ADOT did not

> adequately make the case that the improved shuttle is not a reasonable or feasible and prudent alternative. The [Final Environmental Impact Statement] will need to designate the improved shuttle as the preferred alternative unless all engineering and environmental factors together plus strong agency and public input convincingly demonstrate that truly unusual factors and problems of extraordinary magnitude exist with the improved shuttle.

App. 110.

Yet, FHWA ultimately chose to fund the road project without finding that the improved rail shuttle involved any truly unusual factors or problems of extraordinary magnitude. App. 38-39 (rejecting improved shuttle solely because it would not meet the project purpose and need). Instead, FHWA found that the improved shuttle would fail to satisfy the "corridor demand" for access to Whittier. "Corridor demand" is "essentially equivalent to the demand expected if there were road access with no toll," and thus equates to "road demand." App. 112-113. Thus, FHWA rejected the improved rail shuttle option because fewer people would ride the shuttle than would drive to Whittier, were a road constructed. FHWA did not contend that the relatively fewer numbers of rail travelers would cause any unique problems or truly unusual circumstances, and identified no unique problems associated with the improved rail shuttle whatsoever.

## PROCEEDINGS BELOW

In April 1996, Alaska Center for the Environment, *et al.* (ACE), filed a complaint in the U.S. District Court for the District of Alaska challenging FHWA's decision.[4] In the next year, as the merits were briefed and considered by the court, ACE twice moved for preliminary injunctive relief to halt road construction-related activities. The district court denied both motions. ACE appealed the latter denial to the Ninth Circuit, and the motions panel entered an injunction pending the district court's decision on the merits. The very next day, the district court entered summary judgment against ACE. ACE immediately appealed that decision, and the same motions panel of the Ninth Circuit preliminarily enjoined the project pending its decision on the appeal. After briefing and argument, the merits panel of the Ninth Circuit lifted this injunction without opinion. Six weeks later, the merits panel released an opinion affirming the district court's decision, an opinion which was later amended with no change in result. The Ninth Circuit also denied ACE's petition for rehearing en banc.

The Ninth Circuit held that, notwithstanding *Overton Park* and FHWA's own regulations, FHWA need not demonstrate any truly unusual factors or problems of extraordinary magnitude associated with the improved rail shuttle. FHWA need only show that the improved shuttle would fail to meet some stated project purpose or need. Because the improved rail shuttle would allegedly not satisfy the project "need" of meeting "corridor demand," FHWA could reject it on that basis alone. 131 F.3d at 1289.

## REASONS FOR GRANTING THE WRIT

In determining whether to grant a petition for a writ of certiorari, this Court considers, among other things, whether the decision below conflicts with a decision of this Court or

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[4] The district court had jurisdiction over the case pursuant to 28 U.S.C. § 1331.

other circuit courts of appeals. Supreme Court Rule 10(a), (c). The Court is less likely to review questions of fact, or alleged misapplications of a properly stated rule of law. Id. The Ninth Circuit's decision conflicts with this Court's opinion in *Overton Park* and with several opinions of other courts of appeals. Further, this case will not require the Court to review questions of fact or a misapplied rule of law, but rather an erroneously stated rule of law.

## I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH *OVERTON PARK.*

The Ninth Circuit eviscerated Section 4(f) by eliminating the requirement that the government demonstrate that truly extraordinary circumstances render an avoidance alternative imprudent. Instead, the Ninth Circuit held that the government must only craft a stated "need" for the project which an avoidance alternative would fail to achieve. Once it makes this showing, the government may build a road through parkland even though there is a prudent alternative within the meaning of *Overton Park.*

Specifically, the Ninth Circuit stated that

> FHWA rejected the rail system alternative because it did not satisfy the purpose of the project – to meet the demand for access into Whittier. In this circumstance, the FHWA is not required to make a further showing of 'unique problems' or 'truly unusual factors' associated with the rail alternative. . . . The FHWA did not act arbitrarily, capriciously, or abuse its discretion by rejecting an alternative which would not satisfy the purpose of the project.

131 F.3d at 1289.

As explained above, FHWA defined the "demand for access into Whittier" as that level of demand that would exist if a toll-free road were built. "Demand for access" was therefore

synonymous with "demand for toll-free road access," or "road demand." Not surprisingly, the record indicates that the demand for free road access exceeds the demand for access via rail shuttle, or any other mode of transportation. Thus, the only way to satisfy the "demand" for road access is to build a road. Any other project would, by definition, fail to meet one of the project's purposes, and is therefore imprudent according to FHWA.

This circular reasoning vitiates Section 4(f)'s strict prohibition against the construction of roads through parkland absent truly extraordinary circumstances. It allows the construction of roads through parkland with no showing that a viable avoidance alternative entails unique problems or extraordinary costs, contrary to Section 4(f)'s very purpose. Instead, FHWA must merely find that the avoidance alternative fails to meet *some* stated project objective.

In order to be consistent with *Overton Park,* however, FHWA must show that the *implications* of the avoidance alternative's failure to meet a stated project need involve truly unusual factors or unique problems. Otherwise, as in this case, agencies are free to skirt Section 4(f)'s mandate by artificially manipulating the statement of project purpose and need to ensure that viable avoidance alternatives fail to meet some portion of the stated purpose. Here, the primary project purpose is to substantially improve access to Whittier. *See Van Abbema v. Fornell,* 807 F.2d 633, 638 (7th Cir. 1986) (holding that agencies must reasonably articulate the primary project purpose, and not dictate an end result through artful drafting of the statement of purpose and need).

As explained above, the improved rail shuttle would provide safe, affordable, and convenient access to anyone who desires to go to Whittier. It would also generate significant levels of economic growth. Further, as FHWA admits, neither the improved rail shuttle's projected failure to meet "road demand," nor any other circumstance associated with

the project, causes any unique problems. The improved rail shuttle therefore satisfies the legitimate project purpose of significantly improving access to Whittier and western Prince William Sound, and is a "feasible and prudent" alternative pursuant to Section 4(f) and *Overton Park*.

## II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH OTHER CIRCUIT COURTS.

In addition to conflicting with *Overton Park*, the Ninth Circuit's decision conflicts with numerous decisions from other Circuits that uphold *Overton Park's* requirement that agencies demonstrate truly unique problems related to an avoidance alternative before rejecting it.

The Second, Fourth, Tenth, and D.C. Circuits have all continued to require federal agencies to make some showing of unique problems or truly unusual circumstances associated with an avoidance alternative. *See Monroe County Conservation Council v. Adams*, 566 F.2d 419, 423 (2nd Cir. 1977) (rejecting avoidance alternative which would disrupt a cemetery, university campus, and extensive residential areas); *Hickory Neighborhood Defense League v. Skinner*, 893 F.2d 58, 61-62 (holding that record contained no evidence of "imprudence" associated with avoidance alternative within the meaning of *Overton Park), after remand*, 910 F.2d 159, 163 (4th Cir. 1990); *Committee to Preserve Boomer Lake Park v. Dep't. of Transportation*, 4 F.3d 1543, 1550 (10th Cir. 1993) (finding that combination of more traffic congestion, substandard curves raising safety concerns, more residential and commercial relocations, and higher road user and construction costs rendered avoidance alternative imprudent); *Coalition on Sensible Transportation v. Dole*, 826 F.2d 60, 64 (D.C. Cir. 1987) (finding that use of long retaining wall bordering park, at times fifty feet high, could be regarded "grotesque" and sufficiently problematic to render avoidance alternative imprudent).

Other than the Ninth Circuit, only one Circuit Court of Appeals has stated that a federal agency may rely on its

stated project purpose, without more, can justify its rejection. *Druid Hills Civic Ass'n. v. Federal Highway Administration,* 772 F.2d 700, 715-16, n.18 (11th Cir. 1985). In *Druid Hills,* unlike in this case, the avoidance alternative was a "No Build" option, which would not satisfy the project purpose of relieving traffic congestion on major arterials, and thereby reduce excessive traffic in residential neighborhoods. *Id.* at 709, 715.

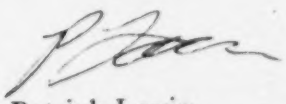
This split in the Circuits is "square": some Circuits require the government to demonstrate that an avoidance alternative involves truly unusual circumstances, and some do not. This lack of uniformity in federal law is the reason this Court considers a split in the Circuit Courts such an important factor in determining petitions for certiorari. *E.g., Yee v. Escondido,* 503 U.S. 519, 538 (1992) (noting that conflicting results in Circuit Courts is a substantial reason for granting certiorari pursuant to Supreme Court Rule 10); *Beaulieu v. United States,* 497 U.S. 1038, 1039-40 (1989) (White, J., dissenting from denial of certiorari because Circuits were split on a significant evidentiary issue). It is particularly imperative to resolve this conflict because much of the nation's federal parklands are located in the territory covered by the Ninth Circuit. *See Escondido,* 503 U.S. at 538 (noting special importance of resolving conflict among courts in interpreting law applicable to mobile home owners, given that a large percentage of mobile homes were located in the jurisdiction affected by the conflict).

## CONCLUSION

The Ninth Circuit's decision in this case undermines Congress' intent in enacting Section 4(f) and this Court's landmark opinion in *Overton Park.* It also conflicts with the majority of Circuit Courts, causes environmental harm to prized parklands in this case, and subjects much of the Nation's federal protected land to further harm in the future. This Court should therefore grant the petition for certiorari and should reverse the decision of the Ninth Circuit.

This Court should therefore grant the petition for certiorari and should reverse the decision of the Ninth Circuit.

Respectfully submitted,



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March 1998

**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

ALASKA CENTER FOR THE ENVIRONMENT; ALASKA WILDERNESS RECREATION AND TOURISM ASSOCIATION; ALASKA WILDLIFE ALLIANCE; AND TRUSTEES FOR ALASKA,

*Plaintiffs-Appellants,*

v.

CARL S. ARMBRISTER, Director, Office of Planning and Program; FEDERAL HIGHWAY ADMINISTRATION; PHIL JANIK, Regional Forester, Alaska Region, U.S. Forest Service; U.S. FOREST SERVICE,

*Defendants-Appellees,*

ALASKA VISITORS ASSOCIATION; CHUGACH ALASKA CORPORATION; CITY OF WHITTIER; ALASKA STATE DISTRICT COUNCIL OF LABORERS; STATE OF ALASKA; PRINCE WILLIAM SOUND ECONOMIC DEVELOPMENT COUNCIL, INC.,

*Defendant-Intervenors-Appellees.*

No. 97-35503

D.C. No. CV-96-00148-JKS

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Alaska
James K. Singleton, District Judge, Presiding

Argued and Submitted
July 15, 1997—Anchorage, Alaska

Filed September 2, 1997
Amended December 15, 1997

Before: J. Clifford Wallace, John T. Noonan and David R. Thompson, Circuit Judges.

Opinion by Judge Thompson

## SUMMARY

### Government Law/Transportation

The court of appeals affirmed a judgment of the district court. The court held that a purpose and need for access to a populated area can support construction of a road through a federal recreation area when the government finds that a rail alternative cannot meet the projected demand for access.

The only ground route to Whittier, Alaska is 12 miles of railway. The rail system is inadequate to meet the demand for access to Whittier. In 1995, the Federal Highway Administration (FHWA) and the Alaska Department of Transportation published a final environmental impact statement (EIS) and draft evaluation of the Whittier Access Project under § 4(f) of the Department of Transportation Act (DOTA). Four alternatives were considered. Alternative 2 proposed improvement of the existing rail system; Alternative 3 contemplated a new road. The EIS identified Alternative 3 as the preferred choice because expanded rail service would be insufficient to meet the demand for access to Whittier.

Construction of the road would have used fractional amounts of land in two federal recreational areas protected by DOTA. Section 4(f) prohibits the use of land in a federal recreational area unless the FHWA determines that there is no prudent and feasible alternative.

Appellant Alaska Center for the Environment (ACE) brought an action challenging the decision to build and fund the road. The complaint alleged that the FHWA's decision violated § 4(f) because improving the existing rail system was a prudent and feasible alternative. ACE also contended that the EIS violated the National Environmental Policy Act because (1) it did not adequately discuss safety hazards; and (2) the FHWA defined the purpose of the project too narrowly.

The district court denied ACE's request for a preliminary injunction and granted summary judgment for the FHWA. ACE appealed. The court of appeals granted an injunction pending appeal and dissolved it after oral argument.

[1] The FHWA determined that the improved rail system was not a prudent alternative because it would not meet the stated purpose and need for the Whittier Access Project. [2] The administrative record indicated that the purpose of the Whittier Access Project was to provide access to Whittier, contribute to the state economy, and provide transportation costs comparable with nearby communities. The State emphasized that the essence of the project was to meet the projected demand for access to Whittier.

[3] The FWHA concluded that while enough rail capacity could be provided to meet demand, the trains would actually carry relatively few passengers due to the lesser demand for access by rail. The FHWA relied on several studies in support of this conclusion.

[4] Beyond the inability to meet the demand for access, the FHWA provided information demonstrating that the rail system would not provide improved access for emergency services. The FHWA also determined that there were significant safety concerns with providing an improved rail service.

[5] The FHWA considered the relevant factors and alternatives and reasonably determined that the improved rail system

was not a prudent alternative. Alternatives that do not accomplish the purpose of the project may be rejected as imprudent. [6] The FHWA rejected the rail alternative because it did not satisfy the purpose of the project. The FHWA did not act arbitrarily, capriciously, or abuse its discretion.

[7] An EIS must set forth sufficient information to enable the decisionmaker to consider environmental factors and make a reasoned decision. [8] The EIS examined the relative safety risks associated with the road and rail alternatives, and specified the measures that would be taken to lessen them. The EIS did not fail to provide sufficient data regarding safety concerns.

[9] The purpose of the project was not defined too narrowly. Meeting the demand for access into Whittier was a reasonable purpose. [10] The FHWA's definition of the project's purpose and analysis of the alternative did not violate the NEPA.

---

## COUNSEL

Patrick D. Lavin, Anchorage, Alaska, for the appellants.

Albert M. Ferlo, Jr., Assistant Attorney General, Washington, D.C., for the defendant-appellees.

John L. Steiner and James E. Cantor, Assistant Attorneys General, Anchorage, Alaska, for appellee State of Alaska.

Frederick H. Boness, Anchorage, Alaska, for intervenor-appellee City of Whittier.

Philip Blumstein, Anchorage, Alaska, for intervenor-appellee Chugach Alaska Corporation.

Susan A. Burke, Juneau, Alaska, for intervenor-appellee Alaska Vistors Association.

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## ORDER

The slip opinion filed September 2, 1997 is amended as follows:

(1) In the slip opinion, page 11071, lines 23 through 26, the following is deleted: "ACE does not contend that the FHWA defined the purpose of the project so narrowly as to disqualify all alternatives except the road alternatives." The first three words of the following sentence are changed to read: "In this circumstance.". By making these changes, this paragraph of the opinion will read:

> In the present case, the FHWA rejected the rail system alternative because it did not satisfy the purpose of the project — to meet the demand for access into Whittier. In this circumstance, the FHWA is not required to make a further showing of "unique problems" or "truly unusual factors" associated with the rail alternative. *Arizona Past and Future*, 722 F.2d at 1428. The FHWA did not act arbitrarily, capriciously, or abuse its discretion by rejecting an alternative which would not satisfy the purpose of the project. *See id.* at 1428-29.

(2) At slip op. 11071, three lines up from the bottom, the title of the heading is changed from "B. Environmental Impact Statement" to "B. NEPA".

(3) At slip op. 11071, second line up from the bottom, the following language is inserted between "EIS" and "failed": "violated the NEPA because it". This sentence will then begin: "ACE next argues the final EIS violated the NEPA

because it failed to adequately discuss the safety concerns . . . ."

(4) At slip op. 11072, the following two new, final paragraphs are added to the opinion, just above the final word "AFFIRMED.":

> ACE also argues the FHWA violated the NEPA because the FHWA defined the purpose of the project too narrowly. Contrary to ACE's argument, the purpose of the project is not defined so narrowly as to disqualify all alternatives except the road alternatives. The purpose of the project is to meet the demand for access into Whittier. This is a reasonable purpose. *See City of Carmel-by-the-Sea v. United States Dep't of Transp.*, 123 F.3d 1142, 1155-57 (9th Cir. 1997); *Citizens Against Burlington v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).
>
> The FHWA also thoroughly considered the improved rail system alternative, but determined the rail system would not meet the total demand for access. *See Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992) ("Once satisfied that a proposing agency has taken a 'hard look' at a decision's environmental consequences, the review is at an end."). The FHWA's definition of the project's purpose and analysis of the alternatives did not violate the NEPA. *See City of Carmel*, 123 F.3d at 1155-57.

With the foregoing changes to the opinion, the panel has voted unanimously to deny the petition for rehearing. Judge Thompson has voted to reject the suggestion for rehearing en banc, and Judges Wallace and Noonan recommend that suggestion be rejected.

The full court has been advised of the suggestion for an en banc rehearing and no judge of the court has requested a vote

on that suggestion, nor has any judge of the court called for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

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## OPINION

THOMPSON, Circuit Judge:

### OVERVIEW

Alaska Center for the Environment and several other organizations (referred to collectively as "ACE") challenge the decision to construct and fund a road from Portage to Whittier, Alaska. Pursuant to a joint state-federal transportation project, the Federal Highway Administration (FHWA) approved the construction of the road and agreed to provide funding for the construction. ACE contends that, in reaching this decision, the FHWA violated section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303(c), 23 U.S.C. § 138; and the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370d.

The district court granted the FHWA's summary judgment motion. ACE now appeals. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

### FACTS

Whittier has a population of approximately 250 full-time residents. There is currently no road access into Whittier. Whittier is separated from the state highway system and the community of Portage by approximately twelve miles of undeveloped land. The Alaska Railroad provides the only ground transportation to Whittier. All parties agree the current

rail system is inadequate to satisfy the demand for access into Whittier.

Since 1946, various entities have studied the need for improved access into Whittier. These studies eventually led to the Whittier Access Project. This project is an endeavor of the Alaska Department of Transportation (ADOT), undertaken with the support of the FHWA. The FHWA approved the Whittier Access Project and agreed to provide funding for the Project.

In 1995, the ADOT and the FHWA published their combined final environmental impact statement (EIS) and draft section 4(f) evaluation for the Whittier Access Project. The final EIS considered four alternatives for improving access into Whittier. Alternative 1 is a no action alternative. Alternative 2 proposed improving the existing rail service from Portage to Whittier by increasing the number of trains and building a parallel section of track to allow two trains to operate simultaneously. Alternative 3 proposed building a new two-lane road from Portage to Whittier and using an existing rail service tunnel, for a portion of the new road, as a one-way road. Under this alternative, rail service would continue only for freight. The fourth alternative proposed building the same road as identified in alternative 3 but with a wider shoulder through the existing tunnel, allowing cars to travel in both directions.

The final EIS identified alternative 3 as the preferred alternative. In 1996, the Director of the Office of Planning and Program Development for Region 10 of the FHWA signed the Record of Decision (ROD), selecting alternative 3 for implementation. The ROD discussed the various alternatives and concluded that "only Alternatives 3 and 4, the road options, adequately meet the purposes of and the need for the project."

ACE then brought this action, challenging the decision to build and fund the road. The district court denied ACE's

request for a preliminary injunction and granted the FHWA's summary judgment motion. We granted an injunction pending appeal and ordered expedited briefing on the merits. After oral argument, we issued an order dissolving the injunction. We now affirm the district court's grant of summary judgment.

## DISCUSSION

ACE contends the decision to construct and fund the road violates section 4(f) because improving the existing rail system is a feasible and prudent alternative to constructing the road. ACE also contends the EIS violated the NEPA because it did not adequately discuss the safety hazards inherent in the use of a road for access into Whittier.

### A. Section 4(f)

Construction of the road will use 5.7 acres of the 1,790 acres of the Portage Glacier Recreation Area (approximately 0.3% of the area) and 29.4 acres of the 720 acres of the Portage Lake Recreation Area (approximately 3.3% of the area). These Recreation Areas are federal recreation areas protected under Section 4(f) of the Department of Transportation Act. Section 4(f) prohibits "the use of publicly owned land of a public park [or] recreation area" unless the FHWA determines "there is no prudent and feasible alternative to using that land . . . ." 49 U.S.C. § 303(c); *see also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 405 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

[1] The FHWA determined the improved rail system is not a prudent alternative because that alternative would not meet the stated purpose and need for the Whittier Access Project. We may set aside this decision only if the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Arizona Past*

*and Future Found, Inc. v. Lewis*, 722 F.2d 1423, 1425 (9th Cir. 1983).

[2] The administrative record indicates the purpose of the Whittier Access Project is to meet the following goals:

> provide acceptable access for Whittier residents and business people, contribute to the state economy, provide transportation costs that are comparable with other nearby Alaska communities . . .. and provide better access for emergency services.

The State of Alaska emphasizes that the "essence" of the project is to meet the projected demand for access into Whittier.

[3] The FHWA concluded that, while enough rail capacity could be provided to meet the total demand, the trains would actually carry relatively few passengers due to the lesser demand for access by rail. The FHWA relied on several studies in support of this conclusion. One study states that, in 1997, the rail service can provide access to Whittier for 615 people per hour, but, assuming a road were available, the demand for access would be 1,310 people per hour. On an annual basis, the demand for rail service is 91,000, but the demand for access by road is 897,000. The study further states that, in the year 2015, the corridor demand of persons per hour will be 2,083 people, but the capacity of the improved rail service alternative would be 580 people or possibly 1,048 people if people are allowed to ride in cars attached to flatcars.

[4] Beyond the inability to meet the demand for access, the FHWA provided information demonstrating the rail system will not provide improved access for emergency services. Also, the FHWA determined there were significant safety concerns with providing an improved rail shuttle service. The record demonstrates that the current track and tunnel configuration allows unsafe ice buildup, compromised track structure,

and dangerous rock instability. The northwest entrance to one of the tunnels is prone to avalanches and the FHWA concluded this safety risk would be increased under the improved rail service alternative because of the increased frequency of service and greater train length.

[5] The FHWA thoroughly considered the relevant factors and alternatives and reasonably determined the improved rail system is not a prudent alternative. *See Arizona Past and Future*, 722 F.2d at 1429. "Alternatives that do not accomplish the purposes of the project may properly be rejected as imprudent." *Id.* at 1428. Although ACE strenuously sets forth its belief that an improved rail system is a preferable and more prudent alternative, we may not substitute our judgment for that of the FHWA. *Id.*

ACE, however, further argues that to comply with section 4(f), the FHWA must identify "unique problems or truly unusual factors" relating to the rejected rail alternative. For this argument, ACE relies on our decision in *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442 (9th Cir. 1984).

ACE's reliance on *Stop H-3* is misplaced. In *Stop H-3*, we assumed the rejected alternatives met the stated purpose of the project. Consistent with *Overton Park*, we concluded that, if a rejected alternative would satisfy the purpose of the project without using land covered by section 4(f), an agency cannot reject those alternatives based on increased costs or community disruption unless the costs and disruption are of "extraordinary magnitudes." *Stop H-3*, 740 F.2d at 1449-55.

[6] In the present case, the FHWA rejected the rail system alternative because it did not satisfy the purpose of the project — to meet the demand for access into Whittier. In this circumstance, the FHWA is not required to make a further showing of "unique problems" or "truly unusual factors" associated with the rail alternative. *Arizona Past and Future*, 722 F.2d at 1428. The FHWA did not act arbitrarily, capriciously, or

abuse its discretion by rejecting an alternative which would not satisfy the purpose of the project. *See id.* at 1428-29.

B. NEPA

[7] ACE next argues the final EIS violated the NEPA because it failed to adequately discuss the safety concerns associated with the road and rail system alternatives. An EIS must "reasonably set forth sufficient information to enable the decisionmaker to consider the environmental factors and make a reasoned decision." *Oregon Envtl. Council v. Kunzman*, 817 F.2d 484, 493 (9th Cir. 1987) (quotations and citations omitted).

[8] The record does not support ACE's argument. The final EIS thoroughly examined the relative safety risks associated with the road and rail system alternatives. The final EIS also specified the measures that will be taken to lessen the safety risks associated with the road. The final EIS did not fail to provide sufficient data regarding safety concerns.

[9] ACE also argues the FHWA violated the NEPA because the FHWA defined the purpose of the project too narrowly. Contrary to ACE's argument, the purpose of the project is not defined so narrowly as to disqualify all alternatives except the road alternatives. The purpose of the project is to meet the demand for access into Whittier. This is a reasonable purpose. *See City of Carmel-by-the-Sea v. United States Dep't of Transp.*, 123 F.3d 1142, 1155-57 (9th Cir. 1997); *Citizens Against Burlington v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

[10] The FHWA also thoroughly considered the improved rail system alternative, but determined the rail system would not meet the total demand for access. *See Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992) ("Once satisfied that a proposing agency has taken a 'hard look' at a decision's environmental consequences, the review

is at an end."). The FHWA's definition of the project's purpose and analysis of the alternatives did not violate the NEPA. *See City of Carmel*, 123 F.3d at 1155-57.

AFFIRMED.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

| | |
|---|---|
| ALASKA CENTER FOR THE ENVIRONMENT, *et al.*, | |
| Plaintiffs, | |
| vs. | Case No. A96-O148 CV (JKS) |
| CARL S. ARMBRISTER, *et al.*, | ORDER |
| Defendants, | (Summary Judgment) |
| and | |
| ALASKA VISITORS ASSOCIATION, *et al.*, | |
| Intervenor-Defendants. | |

The Alaska Center for the Environment, an environmental organization and other interested organizations (collectively called "A.C.E.") sue Carl S. Armbrister ("Armbrister") in his official capacity as the Director of the Office of Planning and Program Development, Federal Highway Administration ("FHWA"), Region 10, Department of Transportation, and the FHWA.,

challenging the government's selection and approval of a preferred alternate plan for a transportation project to improve ground access to Whittier, Alaska. A.C.E. sues pursuant to § 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 303(c), the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§553, *et seq*. A number of parties have intervened.

The parties are familiar with the facts of the case and the Court will not restate them here.[1] Suffice to say, the Court has jurisdiction, and the issue presented by this case, though it arises under separate environmental statutes, simply put is this: There is no road to Whittier. In order for visitors to reach Whittier they must go by water or rely upon infrequent train service. The question is: does the possibility of improving that inadequate train service

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[1]This Court is but a transit point to the Circuit Court which will decide all legal issues *de novo*. *See Stop H-3 Ass'n v. Dole*, 740 F.2d 1447, 1449 (9th Cir. 1984). Because the Secretary's determinations of fact are binding if made in conformity with the law, there is really no independent role for this Court except to assure an adequate record for appellate review . The record is adequate for that purpose.

preclude the government from authorizing, and the State of Alaska from building, a road that would, in part, make use of the existing rail bed to pass through the mountains. The government carefully considered improved rail service as an alternative and rejected it. This action followed. The answer to the question posed by this case is found in decisions of the United States Supreme Court and primarily in *Citizens to Preserve Overton Park, Inc. v. Volpe, Secretary of Transportation,* 401 U.S. 402 (1971).

In *Overton Park* the Supreme Court dealt with the Secretary of Transportation's plan authorizing a six-lane interstate highway through a public park in the center of Memphis, Tennessee. The Supreme Court concluded that that decision was subject to judicial review and that the review should be plenary. The Supreme Court noted that § 4(f) of the Department of Transportation Act of 1966, as amended, and § 18(a) of the Federal-Aid Highway Act of 1968, 23 U.S.C. § 138, prohibited the Secretary of

Transportation from authorizing use of federal funds to finance the construction of highways through public parks if "a feasible and prudent" alternative route exists. If no such route is available, the statutes allow him to approve construction through parks only if there has been all possible planning to minimize harm to the park. The Supreme Court recognized the Secretary's broad discretion, but cautioned:

> Congress clearly did not intend the cost and disruption of the community were to be ignored by the Secretary. But the very existence of the statues indicates that protection of park land was to be given paramount importance. The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternate routes reached extraordinary magnitudes. If the statutes are to have any meaning the Secretary cannot approve destruction of park land unless he finds the alternative routes present unique problems.

*Id.* At 412-413 (footnotes omitted). This rather expansive *dicta* must be evaluated in light of the circumstances facing the Supreme Court, a six-lane highway through the center of Memphis, Tennessee. Unlike the City of Memphis, Alaska is not limited to a few "green havens." As a practical matter 60% of the state is in federal hands, 35% of the state is

divided between the state and Native corporations, and less than 5% is in private hands. In a very real sense the entire State of Alaska , 1/5 the size of the continental United States, is a giant park.[2] Given this fact, the Supreme Court's recognition that courts should not subject the Secretary's decision authorizing the expenditure of federal funds to *de novo* review or require that it meet the substantial evidence test is particularly significant. *Id.* At 415.

The Court must first evaluate the entire record to determine whether the Secretary properly construed his authority to approve the use of park land as limited to situations where there are no feasible alternative routes or where feasible alternative routes involve uniquely difficult problems. *Id.* At 415-416. The Secretary did so in this case. Secondly, the Court must evaluate the choices made to determine whether they were "arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with the

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[2]Roderick Nash is a thoughtful environmentalist and proponent of "wilderness"; he has discussed this issue at length. *See* RODERICK NASH, WILDERNESS AND THE AMERICAN MIND, (Yale

law." 5 U.S.C. § 706(2)(a). In order to make this determination the Court must consider whether the decision was based on a consideration of the relevant factors. The determination in this case was based on the relevant factors, which distinguishes this case from virtually all the other cases in which courts have interfered with agency action This Court cannot find that the agency committed a clear error of judgment since reasonable men and women could easily disagree as to whether the improved shuttle service championed by A.C.E. is truly a reasonable alternative to meet the needs of the citizens of Whittier and those state residents and tourists wishing to visit Whittier. In reaching this conclusion the Court finds particularly apt the concluding comments of the Supreme Court:

> Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

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University Press) (3d Ed. 1982), at 272-316. The statistics are paraphrased from Nash.

*Id.* At 416. Finally the Supreme Court required the Secretary to make formal findings and state his reasons for allowing the highway to be built through the park. That was done here, and unlike the situation in *Overton Park*, the administrate record is before the Court and subject to the searching review mandated by the statutes as interpreted by the courts.

The Secretary could well conclude based upon this total record that the improved shuttle service alternative was imprudent because it did not satisfy the "transportation needs" of the project. *See, e.g., Citizens Against Burlington, Inc. v. Busey,* 938 F.2d 190, 203 (D.C. Cir. 1991).

A.C.E. relies primarily on *Stop H-3 Ass'n v. Dole,* 740 F.2d 1442 (9th Cir. 1984), the last in a series of environmental challenges to road improvements in the State of Hawaii. *Stop H-3* provides little guidance to this case for the very reasons that *Overton Park* and *Stop H-3* are so readily distinguishable on their facts. If numerous roads currently in existence served the Whittier community and the

question was building an additional road, increased mass transit might be a viable alternative, particularly if Whittier was in an area of dense concentrated population where massive demand could generate frequent bus or light train opportunities. Such is not the case with Whittier. If the citizens of the State of Alaska wish to visit Whittier and partake of the tremendous recreational opportunities that Prince William Sound offers and the citizens of Whittier wish access to the outside world and with it the medical, business, and recreational facilities that access offers, then an all weather road is the only possible alternative. On this record a determination that improved shuttle service was a suitable alternative or even a conceivable alternative to a road would have been arbitrary, capricious, or an abuse of discretion. *Cf. Overton Park,* 401 U.S. at 416.

A.C.E. makes three claims under NEPA: (1) A.C.E. claims that FHWA violated NEPA by accepting ADOT's characterization of the project's purposes, which A.C.E. claims ADOT manipulated to dictate the conclusion that

only the road alternatives were feasible and prudent; (2) A.C.E. claims that the FHWA concluded the road would provide safer access to Whittier than the improved shuttle and that this conclusion is unsupported on the record and arbitrary and capricious; (3) A.C.E. claims FHWA violated NEPA in not disclosing alleged revised cost estimates for the project and user toll. Bearing in mind that NEPA has no substantive environmental mandates and imposes only procedural requirements, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1979), and that NEPA's purpose is to ensure that federal agencies are fully aware of the impact of their decisions on the environment, *Oregon Environmental Council v. Kunsman*, 817 F.2d 484 492 (9th Cir. 1987), this Court after a searching review of the record has concluded that the agency prepared a sufficiently detailed environmental impact statement, considered all of the alternatives and prudently rejected the improved shuttle. The Secretary clearly observed the procedures required by law.

5 U.S.C. § 706 (2)(d). In this case the agency was meticulous, thorough, and enlightened in its evaluation of all possible alternatives. The environmental impact statement satisfies legislative guidelines and required procedures.

A.C.E. relies heavily on *City of Carmel-by-the-Sea v. Department of Transportation,* 95 F.3d 892 (9th Cir. 1996), another factually distinguishable case. There the court criticized the Secretary in the following language:

> [W]here, as here, a range of alternatives is developed in conjunction with one statement of purpose and need is subsequently changed to eliminate all but one of the initial range of alternatives, there has been an abuse of discretion. It does not matter whether the change in purpose and need was undertaken without outcome-forcing intent. The effect of such a change in purpose and need is either to eliminate the range the of alternatives under consideration or to short-circuit a procedure which requires a consideration of practical alternatives presented. Either way there has been no consideration of a reasonable range of alternatives adequate to satisfy NEPA.

*Id.* at 907. In this case the agency gave exhaustive consideration to the shuttle alternative. While A.C.E. prefers an alternate decision it cannot without sacrificing candor deny that its preferred alternative was thoroughly considered.

*Carmel-by-the-Sea* is therefore irrelevant. The agency did not manufacture a single dispositive criterion to eliminate the improved shuttle alternative. It evaluated the shuttle against the road options in detail. *See, cf. e.g., Laguna Green Belt, Inc. v. Department of Transportation*, 42 F.3d. 517 (9th Cir. 1994).

A.C.E. discloses a disturbing elitist bias when it argues that the vast majority of "recreators" do not bring or need to bring a car to Whittier. For the average citizen the automobile is still the primary means of transportation, and this is particularly so in Alaska where dispersed, small populations render mass transportation unworkable. If large numbers of "recreators" have not taken their cars to Whittier or even visited Whittier, the Secretary could well conclude that the reason was that Whittier is currently only accessible at great cost and greater inconvenience.

Finally, it does not appear that the agency's somewhat ambiguous treatment of the relative safety of the shuttle versus a road should disqualify this project. It

appears that the road would be less prone to avalanches than the railroad and that avalanches are a significant risk in the affected area. That the shuttle might be safer in other respects than a road was certainly a factor which the agency considered, but it is hardly determinative. Common sense suggests that accident figures for the Seward and Sterling highways have only limited application to the Whittier road. This is not a situation like *Coalition for Canyon Preservation v. Bowers,* 632 F.2d 774, 782-83 (9th Cir. 1980), where the EIS made no mention whatsoever of potential safety problems. Safety was on consideration, the agency considered in reaching its overall conclusion.

In sum, the citizens of Whittier have waited a long, long time for reasonable meaningful access to the rest of the state. By the same token the citizens of the state have waited a long time for reasonable access to Whittier and the Prince William Sound it potentially serves. The Court is not convinced that the agency abused its discretion or acted arbitrarily or capriciously in reaching the conclusions it did.

In the last analysis reasonable men and women could differ regarding the various alternatives. The agency opted for one reasonable evaluation of the record, A.C.E. presses for another. While the Court having reviewed the record with care is convinced that A.C.E.'s preferred alternative is not prudent as a matter of law and that had the agency agreed with A.C.E. it would have acted arbitrarily and capriciously, it is not necessary to reach that point to resolve this case.

Finally, an issue that has taken up much time with the parties regards the propriety of an injunction or a further stay pending appeal. The Ninth Circuit has set the standard. The Court on a descending scale must weigh the likelihood that plaintiff would prevail on appeal coupled with the injury that plaintiff and the interests which plaintiff defends would suffer should the project go forward, against the injury defendants and the interest they support would suffer if the project is further delayed. *See, e.g, Marbled Murrelet v. Babbitt,* 83 F.3d 1068, 1073 (9th Cir. 1996) (citing *Sierra Club v. Marsh,* 816 F.2d 1376, 1382 (9th Cir. 1987));

*Westlands Water Dist. v. Natural Resources Defense Council,* 43 F.3d 457, 459 (9th Cir. 1994).

Carl von Clausewitz, the Prussian soldier-scholar suggested that war was merely the continuation of policy, i.e., politics by other means. *See* CARL VON CLAUSEWITZ, ON WAR, (Michael Howard and Peter Paret, eds. Princeton University Press) (1984) at 87. In the twentieth century, litigation has substituted for war, in Clausewitz' equation. Clearly the issues in this case are politically charged. In such matters normative and aesthetic judgments emotionally based are in sharp conflict. It is certainly theoretically possible that a given judge might ignore the admonition of *Overton Park* and substitute his or her judgment of the agency's in this matter. Where reasonable men and women may differ, reasons can always be offered in opposition to any project. The feasibility and desirability of the pyramids of Egypt, the Taj Mahal, the White House, and the Capitol Building were no doubt subject to debate. But unless the Secretary automatically

loses whenever the imaginative and creative minds of his opponents can come forward with reasons for reaching alternative conclusions, plaintiffs are certain to fail on their appeal. This Court has a greater respect for the judges of the Ninth Circuit of Appeals than to believe they would allow their emotions to dictate a result. Given the extensive record in this case, which the court has combed, and the law from this and other circuits dealing with comparable situations, it is manifest that an improved shuttle service would not serve the transportation needs of the people of Whittier and the surrounding Alaskan community. Further, the damage A.C.E. fears to the environment is *de minimis*, while the loss to the public in further delay in providing reasonable access to Whittier is concrete, certain, and irreparable. The Court will therefore not grant a stay of its order in this case, and will authorize the resumption of road building.

**IT IS THEREFORE ORDERD:**

A.C.E.'s motion for summary judgment **at Docket No 84** is **DENIED**. Defendants' motion for summary judgment at **Docket No. 91** is **GRANTED**.

Dated at Anchorage, Alaska, this 23 day of May, 1997.

/s/ **JAMES K. SINGLETON, JR.**
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

| | | |
|---|---|---|
| ALASKA CENTER FOR THE ENVIRONMENT, *et al.*, | ) | |
| Plaintiffs, | ) | Case No. |
| vs. | ) | A96-0148 CV (JKS) |
| CARL S. ARMBRISTER, *et al.*, | ) | JUDGMENT |
| Defendants, | ) | IN A CIVIL CASE |
| and | ) | |
| ALASKA VISITORS ASSOCIATION, *et al.*, | ) | |
| Intervenor-Defendants. | ) | |

This matter came on before the Court on the written record and the Court has considered that record with care and reached its decision, separately published.

**IT IS THEREFORE ORDERED:**

The complaint of Alaska Center for the Environment, *et. al.*, is dismissed with prejudice. Because it is clear that a

number of the plaintiffs have a substantial financial interest in this case, the defendants may recover their costs.

Dated at Anchorage, Alaska, this 23 day of May, 1997.

/s/ JAMES K. SINGLETON, JR.
United States District Judge

**Record of Decision**

**Whittier Access Project**

Seward Highway to Whittier, Alaska

Municipality of Anchorage, City of Whittier, and Chugach National Forest

## A. Decision

The Federal Highway Administration (FHWA) concurs with the Alaska Department of Transportation and Public Facilities' (ADOT&PF) selection of Alternative 3 for improving access between the south central Alaska road system and the city of Whittier. This alternative, as outlined in the Final Environmental Impact Statement (FHWA-AK-EIS-94-02-F) approved November 9, 1995, would extend the Portage Glacier Road to Whittier. It would involve road construction along Begich Peak and through Bear Valley, and improvement of the Whittier tunnel to allow joint use of the tunnel by trains and automobiles. The purpose of the project is to provide acceptable access between the Seward

Highway and Whittier, contribute to the State economy, provide transportation costs that are comparable with other nearby Alaska communities, and provide better access for emergency services.

Alternative 3, identified in the Final EIS as the preferred alternative, is also considered the environmentally preferred alternative. It incorporates all practicable measures to minimize harm to the environment. This selection is based on an evaluation of material found in the EIS and various technical studies for the project. The FHWA and ADOT&PF have been the lead agencies for the project. The U.S.D.A. Forest Service (USFS), the U.S. Army Corps of Engineers, and Alaska department of Fish and Game have been active cooperating agencies in the analysis of environmental issues. In May 1994, a Draft EIS and Section 4(f) evaluation was published. As a result of comments on the Draft EIS, several new technical reports were prepared and their findings incorporated in the document. Because the comment and the technical reports required substantial

changes in the Draft EIS, a decision was made to circulate a revised Draft EIS, which was published in May 1995. The Final EIS was published in November 1995.

**B. Alternatives Considered/Rationale for the Decision**

***The Range of Alternatives***

The EIS considered three build alternatives plus the no-action alternative.

No Action (Alternative 1)

Current overland access between the Seward Highway and Whittier is via the Alaska Railroad shuttle. The no-action option would maintain the shuttle operation as it is today, carrying passengers in coach cars and transporting vehicles and their occupants on railroad flat cars. The shuttle would be expected to grow with limited expansion of capacity. There would be no major improvements and pricing, scheduling, and facilities would be expected to remain similar to today's operation (see pp. 3-5 of the DEIS). Because this alternative would require no construction, it would have the lease impact on the environment. It was,

however, not selected as the alternative for implementation because it does not address the purposes nor meet the need of the project.

Improved Railroad Shuttle (Alternative 2)

An improved railroad shuttle alternative was carried forward for thorough analysis in the EIS. The analysis documented in the revised Draft EIS, however, determined that this alternative did not adequately meet the purposed and need for the project. This alternative would have improved upon the existing rail shuttle to transport both vehicles and walk-on passengers between Portage and Whittier. It would have modified the track layout at the Portage end to eliminate the need to back the train and uncouple the locomotive to reverse direction. This alternative would have improved capacity and convenience by adding a second train and by improving the staging and loading and unloading operations. A siding would have been added in Bear Valley to allow the two separate train sets to pass. This alternative would have cost approximately $27.5 million to construct. Because it

was determined through further analysis that this alternative does not achieve the purposes of nor meet the need for the project, it was not considered a reasonable alternative in the Final EIS.

<u>One-Lane Road Through Whittier Tunnel (Alternative 3 – The Selected Alternative)</u>

This alternative involves extending the existing Portage Glacier Road across Portage Creek, around the north side of Portage Lake, over Placer Creek, and across Bear Valley to a vehicle staging area. From the staging area vehicles would pass through the tunnel, which would be improved to be safe for automobile use, one direction at a time on a single lane. Trains would also use the tunnel, although only freight and chartered passenger service are expected to remain on the rail line, and all automobile traffic would be halted when a train passes through the tunnel. A similar staging area would be constructed near West Camp on the Whittier side of the tunnel to hold traffic traveling westbound. Construction of the road, tunnel improvements, and staging areas at each

tunnel portal are projected to cost $49.8 million. This alternative satisfies the purposes of and need for the project and is the selected alternative.

One-Lane Road with Shoulder Through Whittier Tunnel (Alternative 4)

This alternative is similar to Alternative 3. The only difference is the width of the Whittier tunnel. Under Alternative 4, the tunnel would be widened to allow for a single lane of traffic and a full shoulder. This would increase the safety of the tunnel and the assumed speed at which drivers would be comfortable driving in the tunnel, thereby slightly increasing capacity. The added tunnel work would also add to the cost, however, bringing the projected total for construction to $69.9 million. This alternative satisfies the purposes and need for the project. It was not chosen as the selected alternative because the added costs outweigh the slight added benefits.

***Factors and Values that Figure into the Decision***

The process by which the selected alternative was identified involved analyzing the four alternatives to determine if they met the purposes of and need for the project and through consideration of environmental, social, and economic impacts.

The five main problems with the current system identified in the project scoping meetings and public comments were (1) lack of capacity, (2) inconvenience, (3) high user cost, (4) nonstandard safety problems, and (5) a transportation infrastructure that is not capable of cost-effectively contributing to the Alaska economy. The purposes of improved access (and this project), therefore, are to provide (1) access with greater capacity to meet the projected demands for transportation in the corridor, (2) more frequent and convenient access, (3) access that is less expensive for users, (4) safer access, and (5) an improved transportation infrastructure capable of cost-effectively contributing to the state economy. To be a reasonable alternative, an alternative

must adequately achieve these purposes and meet the need of the project. Alternative 2 was carried forward in the EIS analysis partly because of public expectation and because it is a technically feasible alternative that effectively illustrates corridor transportation issues for comparison against Alternatives 3 and 4. Of the four alternatives carried forward and fully analyzed in the EIS, only Alternatives 3 and 4, the road options, adequately meet the purposes of and the need for the project. Both alternatives have sufficient capacity to accommodate design hour demand throughout the 20-year project life; both would make substantial improvements in convenience, safety, and user cost; and both would cost effectively contribute to the state economy. Alternative 4 would create and accommodate as much recreation and tourism visitation as Alternative 3 but would cost about 40 percent ($20.1 million) more in capital cost and have higher yearly operations and maintenance costs (due to greater ventilation requirements). The higher price would cause the break-even point to occur in eight years (in 2005) instead of

six, and the internal rate of return, benefit-cost ratio, and net present value were not as favorable as Alternative 3. Alternative 3 is more cost effective than Alternative 4, and was therefore selected for implementation.

**C. Measures to Minimize Harm**

Implementation of the selected alternative will include all measures summarized in Chapter 3 of the FEIS and described in detail in Chapter 5 of the DEIS. This section summarizes the mitigation proposed by ADOT&PF to minimize the direct environmental impacts that are likely to result from the selected alternative. For more information, refer to the pages in the DEIS or FEIS listed at the end of each section below.

*Air Quality.* Tunnel ventilation improvements will be added to ensure that carbon monoxide concentration levels in the tunnel meet the nation ambient air quality standard (NAAQS) (p. 5-5 of the DEIS).

*Water Quality.* Treatment of runoff from the staging areas and tunnel will be designed to meet the Alaska Department

of Environmental Conservation (ADEC) requirements for storm water treatment (p. 5-61 of the DEIS).

*Wetlands/Fisheries*. The storm water collection system at portal 2 (the western end of the tunnel) will be designed to prevent adverse impacts to water quality of the wetland and creek complex from staging area runoff. Also, construction-related water quality impacts will be minimized. To enhance fish habitat further, rechanneling will incorporate habitat structures in the creek and result in well-designed deeper sinuous channels. Fishery enhancements will be developed in coordination with the U.S. Fish and Wildlife Service (USFWS), and the Alaska Department of Fish and Game (ADF&G). Interpretive signage at the staging areas will describe the wetland ecology (p. 5-25 and 5-62 of the DEIS). Two options are being evaluated to provide additional mitigation. Depending on the outcome of continuing coordination, ADOT&PF will either: (1) extend the sinuous channels around the south end of the staging area as topography allows or (2) enhance fish passage through

perched culverts. Selection of the enhancement will be made during project design in coordination with USFWS and ADF&G (p. 3-3 of the FEIS).

*Hazardous Waste.* An ADEC approved, corrective action plan will be developed for any unforeseen contamination in the right-of-way and implemented prior or during construction. The contractor will also be required to develop and implement a hazardous material control plan (p. 5-22 and 5-62 of the DEIS).

*Fish and Wildlife.* To limit harassment in new areas of access (such as Bear Valley), parking outside of the staging area will be limited and the USFS will enforce Bear Valley's non-motorized access status. Impacts that occur from in-water construction will be mitigated by timing construction to miss periods of critical fish and water-bird use and by implementing best management practices (p. 5-62 of the DEIS).

*Protected Species.* Pale poppies that will be disturbed at the site near the Begich, Boggs Visitor Center will be

transplanted to appropriate habitat (p. 5-62 of the DEIS). Potential impacts to Norberg arnica plants will be reduced through specific mitigation measures including marking boundaries, seed collection and protection. These measures will be implemented in coordination with the Forest Service (p. 5-28 and 5-62 of the DEIS).

*Water Bodies and Floodplains*. All new roads and bridges would be located above the expected 100-year flood elevation and would meet ADOT&PF standards. A U.S. Coast Guard bridge permit will be required and obtained for the span of Portage Creek. Culverts will be designed to accommodate fish passage if the stream supports fish (p. 5-63 of the DEIS).

*Visual Resources*. The road was designed near lake level and with retained earth fills in the lake to avoid blasting the rock uphill of an adjacent to the road. Other mitigation will include careful design of shoulder fill requiremcnts to remove as little vegetation a possible, with potential for planting native species intermittently along slopes stabilized

with riprap. Other mitigation measures include ensuring that the strong horizontal line typically associated with a road will be broken up by such techniques as random placement of rock and riprap in a natural appearing pattern. The guard rail will be built of weathered steel that matches the surrounding earthy colors, and finished textures and colors of any retaining walls and any minor blasting necessary will reflect the colors and random, nonlinear nature of the naturally weathered rock in the area. Any posts used for a guardrail will be wooden. The staging area will be designed to separate rail operations and automobile waiting areas and to minimize the impacts of a large paved area (p. 5-63 of the DEIS).

*Cultural Resources*. Signs that discuss the Portage Pass Connecting Trail and Iditarod National Historic Trail, the building of the tunnels, and the operation of the railroad, will be erected at the staging areas. The USFS has agreed to be involved in developing road signs and interpretive signs. The interpretive signs are an ADOT&PF commitment and

are to explain (1) the history of the tunnels, Iditarod National Historic Trail and Portage Pass Connecting Trail, and specific historic sites of which no material remains any longer exist, and (2) the function and value of Portage Valley wetlands and wetlands in general. Also, changes to the tunnel will be documented for historic purposes (p.5-63 of the DEIS).

*Facilities*. ADOT&PF committed to providing and maintaining toilets at the Bear Valley staging area to help alleviate impacts to restrooms at the Begich Boggs Visitor Center. ADOT&PF will also thoroughly evaluate traffic patterns as part of its new road design to minimize impacts to traffic accessing the visitors center and the tour boat launch facility (p. 3-4 of the FEIS).

*Pedestrians and Bicycles*. ADOT&PF will provide a bicycle and pedestrian shuttle through the Whittier tunnel if the private sector does not provide this service and if substantial demand develops (p. 5-64 of the DEIS).

*Transportation and Infrastructure*. State-of-the-art automated traffic signals, gates, and sensors, along with cameras throughout the length of the tunnel, will ensure that all trains or automobiles going one way are clear of the tunnel before a line of automobiles is allowed to proceed the opposite way (p.5-64 of the DEIS).

*Construction*. Construction will be staged to cause the least impact to train and automobile use of the existing infrastructure. Travelers will be alerted to train schedule and road closure changes. ADOT&PF will coordinate with the business community to schedule closures to minimize revenue losses and inconvenience to tourists. Emergency access plans will be put in place before any shutdown. Construction of the Portage Glacier Road extension and intersection with the visitors center access road will be built to minimize impacts to traffic accessing the visitors center and the tour boat launch facility. Construction activity to build the road around Begich Peak will occur outside the existing road except as the intersection with the Portage

Glacier Road. Blasting operations will be timed to minimize disruption to visitors in Portage Valley (p. 5-64 of the DEIS). Impacts on fish from the attendant shock waves will be mitigated by timing construction to avoid sensitive periods for fish. No in-water blasting will be performed. Blasting in surrounding areas near critical fish habitat will be done in compliance with ADF&G's blasting standards.

**Section 4(f)**

Previous sections discuss the rationale for selection of Alternative 3 and the basis for determining that there are no feasible and prudent alternatives to the use of property from the Portage Glacier and Portage Lake Recreation Areas. The alignment of the road has been carefully planned to minimize use of and disturbance to 4(f) property. The road itself will enhance some recreation opportunities by providing access to public recreation areas now difficult to reach, and by providing restroom facilities and interpretive signs about the history of the area. Visual Impacts will be minimized by lessening rock cuts and scars. Retaining walls and guard

rails along Portage Lake will have an architectural finish that will complement the color and texture of the existing rock on Begich Peak. The Portage Creek bridge will be built with abutments pulled back from the water's edge to minimize disruption to the natural form of the stream. This will also allow a proposed trail to go underneath the bridge eliminating the need for pedestrians to cross the new road. As compensation for the use of the recreation land, ADOT&PF, through its Trails and Recreational Access For Alaska (TRAAK) program, will construct a series of recreational trails in Portage Valley. The trail system, called the Portage Valley Integrated Trail System by the Forest Service, will be constructed by the time the road opens. Alternative 3 incorporates all appropriate measures to minimize harm to the Portage Glacier and Portage Lake Recreation Areas.

**D. Comments Received on the Final EIS**

The U.S. Environmental Protection Agency had no comments on the Final EIS. No additional substantive

comments were received from other governmental agencies. Several comments were received from the general public, organizations and business. Most of the comments were the same or similar to comments on the revised Draft EIS. ADOT&PF responded to these comments consistent with earlier responses and with information contained in the Final EIS.

**E. Additional Coordination**

Additional coordination is being undertaken among ADOT&PF, the U.S. Fish and Wildlife Service, the Alaska Department of Fish and Game, the Alaska Division of Governmental Coordination and the U.S. Army Corps of Engineers to reach final agreement on enhancing fish passage through the ARRC's culverts in Bear Valley as a means of mitigating wetland losses.

**E. Monitoring or Enforcement Program**

The ADOT&PF Preliminary Design and Environmental Section, Central Region, Anchorage, will monitor construction activities to ensure that all environmental

conditions, mitigation measures and permit stipulations are met. Moreover, in response to comments, the ADOT&PF proposes ongoing monitoring of tunnel air quality under actual use through 2015. Fixed monitors for carbon monoxide will be installed in the tunnel walls. Data collected at the tunnel operations center will be used in regularly scheduled reviews of tunnel operations to ensure that tunnel air quality will meet state and federal standards. The USFS will monitor the Norberg arnica population remaining in Bear Valley after construction. During the project design phase additional testing for hazardous waste will be conducted and an approved corrective action plan will be developed and implemented during construction. The following permits will be required.

U.S. Army Corps of Engineers, Section 404 Permit

Alaska Department of Governmental Coordination, Coastal Consistency Certification

Alaska Department of Environmental Conservation, Section 401 Water Quality Certification

Alaska Department of Fish and Game, Title 16 Permit

U.S. Coast Guard, Section 9, Rivers and Harbors Act Permit

U.S. Environmental Protection Agency, National Pollution Discharge Elimination System Construction Permit

/s/ Carl. S. Armbrister, Director 3-15-96

Office of Planning and Program Development

Federal Highways Administration

Region 10

49 U.S.C.A. § 303

UNITED STATES CODE ANNOTATED

TITLE 49. TRANSPORTATION

SUBTITLE I--DEPARTMENT OF TRANSPORTATION

CHAPTER 3--GENERAL DUTIES AND POWERS

SUBCHAPTER I--DUTIES OF THE SECRETARY OF TRANSPORTATION

Current through P.L. 105-15, approved 5-15-97

§ 303. Policy on lands, wildlife and waterfowl refuges, and historic sites

(a) It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

(b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States, in developing transportation plans and programs that include

measures to maintain or enhance the natural beauty of lands crossed by transportation activities or facilities.

(c) The Secretary may approve a transportation program or project (other than any project for a park road or parkway under section 204 of title 23) requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if--

(1) there is no prudent and feasible alternative to using that land; and

(2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

23 U.S.C.A. § 138

UNITED STATES CODE ANNOTATED

TITLE 23. HIGHWAYS

CHAPTER 1--FEDERAL-AID HIGHWAYS

Current through P.L. 105-41, approved 8-13-97

§ 138. Preservation of parklands

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project (other than any project for a park road or

parkway under section 204 of this title) which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use. In carrying out the national policy declared in this section the Secretary, in cooperation with the Secretary of the Interior and appropriate State and local officials, is authorized to conduct studies as to the most feasible Federal-aid routes for the movement of motor vehicular traffic through or around national parks so as to best serve the needs of the traveling public while preserving the natural beauty of these areas.

# 2.0 Purpose of and Need for Action

## 2.1 Introduction

The only surface transportation access between the Seward Highway (at Portage) and Whittier is the Alaska Railroad shuttle. Its right-of-way crosses the Chugach National Forest and the Portage Lake and Portage Glacier Recreation Areas. The passenger shuttle operates on a limited, four-day per week schedule between September 15 and May 1. From May 1 to September 15 the shuttle operates from four to six round trips per day. In addition to passenger service, approximately 20 freight trains per month use the same tracks to meet barges in Whittier and provide a service link to interior Alaska's rail system. Any alternative considered outside of the existing railroad or road rights-of-way will use land from the Portage Glacier and Portage Lake Recreation Areas.

The residents and businesses of Whittier and Anchorage and the Alaska Legislature have identified concerns about the limited surface access to and from the ice-free port of

Whittier. Included in their concerns are: emergency service accessibility for medical, fire, accident response, hazardous environmental spills in Prince William Sound, and police actions; limited economic viability for the Whittier business and resident community; limited transportation service for passengers and store supplies; and lack of flexibility for tour boat operators getting their passengers to and from Whittier and the rest of the state. The City of Whittier and Municipality of Anchorage have requested, by resolution, that access between the Seward Highway and Whittier be improved in the form of a road.

During the summer, the current maximum service capacity of the rail shuttle is approximately 30 vehicles and 615 passengers per one-way trip. A scheduled round trip takes three hours. Based on surveys, many groups desire to have improved surface access to and from Whittier, including tourists, ferry users with their vehicles, those who wish to use the Whittier harbor, Whittier residents. If access were less expensive and more convenient, passenger demand

would rise to approximately 2.5 million passenger trips per year by 2015, based again on the survey results.

It is currently expensive to get to and from Whittier using the shuttle. For example, for a family of four with teenaged children, it costs $64 to go 25 miles round trip without a vehicle or $118 with a vehicle. For a single Whittier resident or business person with a vehicle it costs $70 to go round trip between Whittier and Portage. The cost is more with a trailer, or if the vehicle is a bus, delivery truck, or recreational vehicle. Costs per mile are greater for one-way fares.

The intention of the Whittier Access Project is to find an alternative that would provide acceptable access for Whittier residents and business people, contribute to the state economy, provide transportation costs that are comparable with other nearby Alaska communities such as Girdwood and Seward, and provide better access for emergency services. ADOT&PF and the project team have identified and evaluated technically feasible alternatives and further

identified those that are prudent--those that will meet the design year daily passenger and economic demands, provide for safe access between Portage and Whittier at a reasonable cost for each

Whittier is used by these people primarily as a jumping-off point for recreation in Prince William Sound, and the impact of this number of additional people on recreational opportunities and on the recreation value of Prince William Sound is considered in Chapter 6.0. The direct impact of a new road on recreation is mostly in Portage and Bear Valleys, which are used today as recreation destinations. The new road would pass 100 meters (328 feet) from the Begich, Boggs Visitor Center along the base of Begich Peak. Adverse impacts would include noise and visual impacts. See subsections 5.1.2 and 5.2.3.

As described under land use impacts (subsection 5.2.1), the character of lower Bear Valley near the existing road would change dramatically. What is today a relatively undeveloped area traveled on foot (people can request the train to stop in Bear Valley to drop them off or pick them up) by occasional hikers, hunters, and cross-country skiers would become a

well-traveled road corridor with approximately 2 hectares (5 acres) paved for the road and staging area, a tunnel operations center, and a tunnel portal building. These developments would create a major impact to the recreational environment in Bear Valley near the staging area. While the valley receives relatively little use, the road and staging area facilities would permanently alter the character of the valley in the vicinity of the staging area. See subsection 5.3.6, "Irreversible and Irretrievable Commitments of Resources."

On the other hand, the road would provide much easier access to Bear Valley for hunters, hikers, anglers, skiers, and categories of recreators who today would not use the valley at all, including sightseers, recreational photographers, the disabled, and those driving for pleasure. Pedestrians and bicyclists would have new access into Bear Valley along the shoulder of the new road and a bridge over of Portage Creek. Because of concern for keeping people off the railroad tracks and concern for the wildlife habitat and the undisturbed

atmosphere of the valley, the facility design in Bear Valley does not provide long-term parking. Those wishing to hunt, hike, or fish in the valley would ~~have to~~ likely park at the visitors center and walk the shoulder of the new road or dropped off by a passing vehicle to access the valley. Recreational and commercial use of Portage Creek would be temporarily disrupted by bridge construction (see subsection 5.3.4, "Construction Impacts"). Similarly, there is potential for some temporary impact to recreational canoers along the north shore of Portage Lake during construction.

Some members of the public, particularly those who visit Whittier as recreators, value the unique train ride currently available between Portage and Whittier. The train is valued because of the opportunity to ride in an automobile on a railroad flatbed car through two long tunnels and because of the mountain, glacier, and wilderness scenery on the route. This shuttle service would be eliminated if alternative 3 or 4 were built. The access would still be unique, with one-way-at-a-time tunnel traffic, the long tunnel, and the opportunity

to drive the length of railroad tracks set into a concrete road surface. Although access would remain unique, it would be less "different" than it is currently.

Pedestrians and bicyclists would continue to be prohibited in the tunnel. Providing access for pedestrian and bicycle use in the tunnel was considered but rejected as unsafe. Even under alternative 4, with a 21-foot road width, the tunnel would be too narrow to safely accommodate

recently. Tanner crab, king crab, sidestripe shrimp, and spot shrimp are commercial and sport fishing species, and all are in decline in Price William Sound. There are no longer commercial fishing seasons for the crab species and spotted shrimp (Trowbridge 1993).

Terrestrial wildlife in greatest demand by hunters includes deer, goat, black bear, and brown bear. Goats are already being harvested at capacity (Nowlin 1993). Deer are found across the sound, including along Passage Canal, but are concentrated especially on the islands in the southern sound. While they are considered generally abundant, there is currently little funding to study their population health. Deer harvest levels are thought to be near maximum sustainable levels. Black bears inhabit especially the northwestern sound, and they have been studied even less, although spring bear hunting is popular in the sound. Brown bears, which inhabit primarily the large islands in the sound, are currently

being over harvested and are in decline (Nowlin 1993). Hunting seasons have been limited twice and are undergoing internal review for possible further reduction or partial closure.

Marine mannals, birds, and large terrestrial mammals are popular for viewing. The marine mammals of interest include whales, seals, porpoises and dolphins, and sea lions. Popular viewing areas are bird rookeries and seal and sea lion haulouts scattered across the western sound. These view points are also sensitive areas, because they are breeding, nesting, or rearing areas. The Steller sea lion is designated a threatened species by the U.S. Fish and Wildlife Service. Once people are in Whittier, their main mode of accessing Prince William Sound would be by boat. If facilities were built to accommodate the demand, boat use would increase, indirectly impacting fish and wildlife. Greater boat access would mean more use of the sound for fishing, hunting, recreation, and wildlife viewing. High levels of additional fishing could deplete fish stocks, which would not only

impact the fish species but could also impact fish-dependent species such as the Steller sea lion. Such impacts due to over harvesting of fish and wildlife are relatively obvious. Less obvious would be the potential gradual reduction in habitat as more areas were developed for recreational housing, public cabins, or camping areas. Another impact that is difficult to quantify is wildlife harassment. Prohibitions against harassment, especially unintentional harassment by those trying to view and photograph wildlife, is difficult to enforce, although the cumulative effect could be important, especially for sea mammals and some nesting sea birds (see also section 6.5).

As the sound's natural capacity to provide adequate fish and wildlife resources approached, agencies mandated with protecting species at sustainable population levels would likely implement appropriate measures to restrict fish and wildlife resources use and increase the supply of the resource. Examples of management techniques commonly used to restrict taking of resources include reducing bag

limits, shortening fishing and hunting seasons, or issuing fewer permits. The most common technique used to increase supply is to stock streams and bays with hatchery fish. Enhanced fisheries are common enough that they are assumed for areas near Whittier under the build alternatives. If this occurred, it could affect the health of wild stocks of salmon and could contribute to exceeding the carrying capacity of the North Pacific for salmon (Bernton: November 1994; see also subsection 6.5. "Cumulative Impacts").

Although it is difficult to predict what kind of development might take place in the sound as a result of increased visitation via Whittier, the pressure for such development would likely occur. Where development did occur in currently undeveloped areas, wildlife habitat would be lost. Other southcentral Alaska coastal towns receive thousands of fishing and boating visitors each summer, and it is clear that many species adapt well to increased human activity and that management agencies can generally plan for increased

pressure on species. Some species, such as harbor seals and sea lions, are more sensitive to human activity and would more likely be affected by increased activity in the sound. Alternative 1 would have the least ~~a negligible~~ impact on wildlife. Alternative 2, associated with increased visitation and boating, has potential for greater impact. Alternatives 3 and 4 are expected to have the greatest impact, because they are associated with the greatest predicted increase in visitation and likely boat use over a shorter time span. These impacts are discussed in more detail below.

*Alternative 1.* In association with the no-action alternative, total visitation to Whittier is anticipated to grow gradually, increasing about 50 percent between 1997 and 2015. Demand for boating in the sound is predicted to be the lowest of any of the alternatives, although boat traffic could approximately double in the bays nearest to Whittier by 2015. ~~and would not be expected to grow substantially even if additional facilities were provided. Therefore~~, The sport fishing harvest for the same area is projected to be 7,300 –

11,00 fish by 2015. Impacts indirectly related to this alternative to fish and wildlife in the sound would likely be minor ~~negligible~~.

*Alternative 2.* The improved shuttle option is expected to bring roughly double the number of visitors to Whittier than are expected under alternative 1 in 1997, and about four times as many by 2015. An average of 174-273 recreational and sport fishing boats per summer day is projected for 2015 for the bays nearest Whittier (unit 1000; see subsection 6.1.2). One hundred nineteen to 199 of them are projected to be sport fishing boats. Associated with this new visitation would be new hunting, fishing, and other recreation activities in Prince William Sound. If additional boating facilities were built to accommodate growing activity, an increase in fishing and hunting and general human activity in the sound would be expected. The fish harvest is projected at 29,600-49,500 fish per year. Wildlife management agencies would likely respond, and growth in activity would likely be gradual enough to anticipate changes to wildlife and effect a

reasonable response. Based on the expected visitation, and assuming proper management, the impacts to fish and wildlife are expected to be minor. Even without particular increases in management, fish populations would likely remain more affected by commercial fishing than sport fishing. Without added management, deer populations could be over hunted in the sound.

*Alternatives 3 and 4.* Because visitation to Whittier is expected to be much higher under the road scenarios, fishing, hunting, and boating activity would likely be much greater in the sound, indicating a greater potential for impacts to fish and wildlife and management agencies. Opening year projections show eight or nine times as many visitors entering Whittier by road than would be expected using the current shuttle. By 2015, ~~nearly 1.4 million visitors would be expected to arrive in Whittier. Demand for increased boating facilities in Whittier would increase, and if boat facilities were provided, use for the sound would increase substantially~~. on an average summer day during fishing

season, 357-540 recreational boats are projected for unit 1000 (near Whittier). Some 231-383 of these are projected to be sport fishing boats. By year 2015 fish harvest in unit 1000 is projected at 57,600-95,500 fish per year in association with the road alternatives. Increases would be similar in parts of the northwest sound from College Fiord to Port Nellie Juan.

Government agencies would likely try to respond with planning and regulatory measures commensurate with the level of increased access, although the relatively rapid increase in visitation could leave agencies not fully prepared. Management of potential impacts would require an increase in the amounts of time, effort, and expense of public funds on the pat of management agencies. Monitoring populations and regulating and enforcing restrictions would be more difficult, resulting in greater impacts on the management agencies. To protect an existing federal subsistence priority on federal land, high impact or critical habitat areas could be closed to sport hunters by federal subsistence and wildlife

managers. With proper management the impacts to fish and wildlife populations would be moderate, with most impacts likely in the northwest sound, except for deer, which could be over hunted on the large islands in the southern sound. If management agencies were unable to regulate wildlife populations adequately, impacts to fish and wildlife could be major.

### 6.3.3 Prince William Sound Land Use

This subsection discusses the indirect impacts to land use within Prince William Sound that would be associated with increased access and use of the sound. As visitation to Whittier increased, so would use of the sound for recreation and tourism. The users of the sound would create demand for additional services and opportunities, and development of these could impact land use. Demand for resorts, additional public use cabins, and boat services in the sound are examples. The severity of the impacts is based on how consistently the alternatives meet the guidelines outlined in existing development plans, and whether those plans

anticipate change and have the ability to accommodate the demand for land use changes.

Landowners in the sound include Chugach National Forest, the State of Alaska, Native corporations, and private individuals. Land use on the majority of land in the sound is controlled by two plans, the "Land and Resource Management Plan: Chugach National Forest" (USDA Forest Service 1984) and the "Prince William Sound Area Plan for State Lands" (Alaska Department of Natural Resources 1988). The state planning area contains 2.1 million hectares (5.3 million acres) of uplands. About 1.5 million hectares (3.8 million acres) are owned by the federal government as part of Chugach National Forest, and of that, about 850,000 hectares (2.1 million acres) constitute the Nellie Juan-College Fiord Wilderness Study Area (see subsection 6.3.7). Nearly 405,000 hectares (1 million acres) are owned by or have been selected by the state, and Native corporations own about 218,500 hectares (540,000 acres) (Alaska Department of Natural Resources 1988). Other

private land includes small tracts scattered throughout the sound. Important land uses allowed in the plans include recreation and tourism, hunting and fishing, use of the wilderness resource, timber harvesting, and mineral extraction.

The Chugach National Forest plan acknowledges predicted growth in visitation and plans additional facilities to meet demand. The plan acknowledges that cabin use in the sound was near the saturation level in 1984 and states that additional cabins would be needed to meet demand and for public health and safety. Construction of cabins, new trails, campground improvements, and potential marine recreation sites are among the management directives

Adverse impacts include wilderness impacts (see subsection 6.3.7) as they affect recreators. There are also potential adverse impacts to Kenai Peninsula tourism, where business would likely be lost (see subsection 6.4.1) temporarily, until overall growth brought new business to all areas. While the proposed transportation improvements, along with development of facilities in Whittier, could help meet the demand for recreation in the sound, meeting that demand would also create adverse impacts. If facilities in Whittier developed in conjunction with any of the alternatives, as is expected, the larger numbers of additional recreators could conflict with one another, especially at state marine parks and on the limited number of camping beaches, especially in unit 1000, near Whittier (see subsection 6.1.2). Impacts in the sound could begin with relatively little additional development in Whittier, because many independent recreation boaters need only a boat ramp and a place to park

their cars and boat trailers, and kayakers need only a public beach.

Independent recreators and the small adventure-based commercial tours and guides would be impacted most, insofar as their expectations for wilderness experiences that include solitude went unmet. Because their activities require protected anchorages for boats or protected beaches with some flat ground for camping, and because the use in the western sound would emanate mostly from a single source (Whittier), use would concentrate ~~more than~~ as it does today on coves near Whittier, but with more boats in the same area. In coves where use by several parties is already a regular occurrence, the addition of boats would not impact the sense of solitude, although it could create a safety hazard as coves that appeared full turned boaters away in poor weather. In coves where there is rarely more than one party, the addition of even one more party on a given day would be a substantial impact. Increased recreation would likely result in displacement of some recreators seeking a high quality

wilderness experience in areas of solitude and isolation. These users would seek other areas of Prince William Sound offering solitude, typically farther from Whittier, and other access point. In the sound there are limited number of places people can go, so displacement would reduce wilderness recreation opportunities. The areas that would remain would entail greater commitments of time and money for those wishing to have such a wilderness experience. Those recreators using kayaks or other very small open boats, would be at increasing risk of overturning from the wakes of increasing numbers of larger boats. All boaters would be at increased risk of collision as numbers of boats increased, and there would likely be a greater need for assistance and rescue in general.

The small to medium-sized day tour and charter operations would be affected less, because most of their activity does not include staying overnight in coves. But they serve fewer people than large day tour boats and sometimes enter coves, so the expectation for solitude and opportunity to view

wildlife is important. Again, visitors would benefit from the increased opportunity to the point that such operations each became a threat to the other by using many of the same viewing points or fishing holes within a half-day of Whittier. There would be little impact to more traditional tourists such as ferry and cruise ship passengers and large day tour customers. From their point of view, the environment would appear little changed with increased traffic.

Preventing or managing the inevitable conflicts between heavy recreation use and commercial fishing and other commercial activity would require time, effort, and the spending of pubic funds by management agencies, including USFS, ADF&G, the U.S. Fish and Wildlife Service, the Alaska Division of Parks and Outdoor Recreation and potentially the U.S. Coast Guard

Represents an increase of approximately 250 percent, as indicated in subsection 6.1.2 and represents a similar increase in numbers of people who ~~perhaps six times the current numbers of visitors to Whittier, by 2015. The majority of these people would be expected to venture beyond Whittier and into the sound, as the majority does today. Given concurrent development in Whittier, these people~~ would benefit from increased recreation opportunity. Increased use, however, would likely require U.S. Coast Guard and search and rescue activity and increased management by the USFS, Alaska Division of Parks, and wildlife management agencies. Without this response, impact to ~~a few~~ popular coves, ~~cabins~~, and campsites in unit 1000 would likely ~~could~~ be extensive, and even with response, the opportunity for solitude ~~e~~would be reduced. Increased competition for use of public cabins or for hunting permits would be an inconvenience.

Displacement is likely for recreators seeking a high-quality wilderness experience and for ecotourism operators providing such experiences. Such displacements would likely be to other parts of the sound, but some recreators may be denied such an experience in a marine coastal environment at all, because there are few substitute areas in subarctic regions worldwide that do not have similar crowding issues.

*Alternatives 3 and 4.* ~~Eight or nine times the visitors expected under the no action alternative are projected to come to Whittier in 1997 under the roadway alternatives. The number could grow to well over a million visitors by 2015. If facilities developed in Whittier to satisfy demand for boat use in the sound, the majority of these visitors would venture beyond Whittier into the sound, as they do today.~~ If boating facilities were developed in Whittier, those wanting to venture into the sound would likely benefit from opportunities even greater than under alternative 2. Recreators bringing boats by trailer over a new road would

have the greatest advantage (because of the reduced expense), if ramps and parking areas were also developed for them in Whittier. This decreased cost and increased convenience would benefit them greatly, leading to many times more boats entering the sound from trailers. Sport anglers would benefit from greater opportunity for hatchery-grown salmon and from less crowded conditions than on the Kenai Peninsula.

As noted in subsection 6.1.2, by 2015 the average number of recreation and sport-fishing boats per day is expected in the range of 357-540 in unit 1000 (the Whittier-to-Culrose-Island area). This represents an increase of greater than 600 percent over the no-action alternative. This means a 600 percent increase in recreation opportunity and, at the same time, indicates the likelihood of major impacts to the wilderness recreation experience, above, and beyond, those impacts expected under alternative 1.

Collectively, the benefits to individual recreators and tourists could create substantial adverse impact for recreators in the

sound, especially independent recreators and wilderness tour operators, as individuals with their own boats converged on the same coves and beaches and the solitude and cleanliness of those areas was degraded. The number of visitors expected to come to Whittier suggests that management agencies could need to institute limits or a reservation system for some areas, ~~especially~~ of the Nellie Juan-College Fiord Wilderness Study Area, where low contact with other groups is part of a mandate of management. Federal law requires that the human intrusion in the Wilderness Study Area be minimal and that there be no irreversible adverse impacts. (No irreversible impacts are expected: see subsection 6.3.7, "Prince William Sound Wilderness Character") State marine parks also could require

projected use levels are within the capability of the existing ferry system. Under this alternative, one-third of the cross-gulf cruise ship traffic is projected to move through Whittier when the railroad dock is rebuilt and improved rail access is available.

*Alternatives 3 and 4*. The development scenarios associated with the road alternatives would result in the highest levels of increased use for the AMHS ferry. Adjustments in ferry capacity or scheduling would likely be necessary, a moderate impact to AMHS, particularly if ferry service is enhanced to extend the marine highway system to other Prince William Sound communities. Under these alternatives' development scenarios, Whittier is anticipated to capture one-half of the cross-gulf cruise ship traffic.

### 6.3.7 Prince William Sound Wilderness Character

Wilderness is a complex concept in Prince William Sound. Land, forest, sea, mountains, and glaciers—along with

wildlife on land, in the ocean, and in the air—all comprise a wilderness character of Prince William Sound, the USFS manages all Chugach National Forest land, a large sub-set of the general wilderness of the sound, as if it were part of the National Wilderness Preservation System (NWPS).

Meanwhile, the State of Alaska manages the sea in the same area mainly for multiple use. By far most people who experience the wilderness character of the sound experience it from the sea, which does not have the federal protection given to the surrounding land. In this way, the area with federal wilderness protection is not whole. It is islands and peninsulas and larger bays penetrated by water passages that have the character of wilderness but do not have the federal mandate of protection as wilderness.

In addition, the sound is largely composed of classic fiords—steep-sided valley walls and glaciers that drop directly into saltwater. In most areas of the northern and western sound, there are miles of shoreline without beaches. Rocky outcrops or thickly forested hillsides rise from the water to

glaciers and mountaintops without intervening areas conducive to camping or, in many cases, walking. This scenic and somewhat inaccessible topography lends to the general wilderness character of the sound and tends to protect the wilderness resource.

The federal definition of wilderness is reasonable both for areas of the sound managed as federal wilderness and areas that have wilderness character but no formal wilderness management. The definition is in Wilderness Act of 1964, Section 2(c) (as codified in 16 U.S.C. 1131):

> A wilderness…is…an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain…an area of underdeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation…, with the imprint of man's work substantially unnoticeable…, (with) outstanding opportunities for solitude or a primitive and unconfined type of recreation…

The USFS has a Congressional mandate to manage its lands in western Prince William Sound—the Nellie Juan-College Fiord Wilderness Study Area—based on this definition, at least until Congress makes a final decision about inclusion of

some or all of this area in the NWPS. On Chugach National Forest lands outside the study area and on lands and waters owned by the

Automobiles, trucks, recreational vehicles, and buses drive onto flatbed rail cars at the staging areas. Drivers remain in their vehicles for the 30-minute ride to or from Whittier. Foot passengers may park their vehicles at the staging areas and board railroad passenger cars. Bicycle users can also travel on the existing shuttle train.

The current railroad shuttle provides service seven days a week from May through mid-September: six round trips five days per week, and four round trips two days per week. From mid-September through April, service is currently provided four days per week: three round trips three days per week and four round trips one day per week. The existing one-way shuttle train capacity is 30 vehicles, 435 coach passengers, and 180 passengers in cars or buses (assuming an average of six per vehicle) on flatcars. With six trips per day, the shuttle's maximum capacity is 360 vehicles and ~~5,220~~ 7,380 ~~coach~~ passengers. The shuttle is

currently near capacity during peak traffic, occasionally requiring passengers to wait for the next train. Projected traffic volume for vehicle access to Whittier for the year 2015 is estimated at 834 vehicles per day. No significant capacity improvements are assumed with the no-action alternative. Projected corridor demands for the vicinity of the no-action alternative.

The no-action alternative would provide only maintenance and safety improvements to the existing shuttle service and segments of existing roads serving Portage Lake and Whittier. The track would continue to be inspected and maintained throughout the project length on an as-needed basis. Tunnel rehabilitation would occur as funds become available to implement recommendations outlined in the "Whittier and Portage Tunnel Rehabilitation" report prepared by Golder Associates in August 1988.

Although the no-action alternative provides no improvements to the existing shuttle service, costs are still associated with the maintenance and operation of the

existing facility. The costs of this alternative include any deferred maintenance, tunnel rehabilitation work, and installation of a communication system in the tunnels.

### 3.2.2 Alternative 2: Improved Railroad Shuttle

As with the no-action alternative, alternative 2 would continue to provide multi-mode mass transit service between Portage and Whittier. Although alternative 2 would meet the "rail demand," as discussed in Chapter 2.0, it would not meet corridor demand. Note that demand for rail shuttle access is projected to be much lower than the corridor demand projected for road access. This is because the inconvenience and high cost of the railroad limit the demand for its use. To satisfy projected user demand for train service, the following equipment and operations improvements would be required. Two trains, each with two locomotives (on in front and one in back) would be used. This would eliminate the current need to disconnect and reconnect the single locomotive. The two trains would operate simultaneously, leaving from Whittier and Portage at about the same time

and passing each other in Bear Valley. An automatic block signaling system or similar system for controlling and monitoring train movement would be installed at both Portage and Whittier and at intermediate locations along the route. To provide more efficient and effective tunnel maintenance and to increase safety, lighting, electrical receptacles, automated tunnel doors, and ventilation systems would be installed throughout the tunnels. In addition, inside guard rails would be installed throughout both tunnels and over each bridge on the route.

The track alignment at Portage would be modified to provide direct, continuous movement into and out of the siding. This would decrease running and vehicle loading time by eliminating the need to stop and back the train, which is required by the current track alignment. The modifications would include new turnouts and a long curve to the main track at the north end of the existing setout track, and a 213-meter (700-foot) radius curve and turnouts at the southern leg of the wye track (Figure 3.2). Slight variations to this

track layout would be ~~are~~ possible~~. and my be considered during later design phases.~~

To allow the two trains to pass in Bear Valley, a 975-meter (3,200-foot) siding with signals would be constructed on the south side of the main track between the two tunnels (Figure 3.3).

Both the Portage and Whittier staging areas would be modified to allow for expected increases in traffic and to make loading and unloading as efficient as possible. At both Portage and Whittier three loading and unloading docks would be constructed to replace the single dock that now exists at each location.

To provide additional parking spaces, the Portage staging area would be enlarged and paved. It would include ticket booths, restrooms, fencing, and lighting improvements. Modification at the Whittier staging area would include paving and additional lighting along the train track. Both staging areas would include bicycle racks for those who were taking bicycles on the train. Figure 3.2 shows the proposed

Portage staging area: Figure 3.4 shows the proposed Whittier staging area.

Each train would be approximately 550 meters (1,800 feet) long and would provide capacities of 290 passengers in coaches and ~~45~~ 39 vehicles on each train. With 35 minutes for loading an unloading at each terminal, trains would operate hourly. Each train could make eight round trips daily, resulting in a daily capacity of 9,280 passengers and ~~1,440~~ 1,248 vehicles. This would satisfy the projected maximum train traffic levels for the year 2015, but not the total demand in the corridor. Because ARRC would continue to control access under this alternative, presumably its economics in part would dictate the schedule for summer and winter service, and it could vary from these assumptions. There are assumed to be two operational phases. Under phase one, one train would run in any given direction once every two hours, for less-busy times. Under phase two, with two trains passing in opposite directions, service would be every hour. This would begin in summer during peak

weekend days only in 1997 and happen during weekdays by 2000. Phasing the operation in like this would mean some savings to the railroad. Table 3-1 shows a potential phase two schedule. Maintaining an improved shuttle system would be similar to maintaining the existing shuttle service. Additional maintenance personnel would be required to provide tie renewals and resurfacing operations, to inspect and maintain the tunnels, to service the signal system, and to maintain the four locomotives and two complete trains. Installing an adjacent pedestrian and bicycle trail is not a prudent option, as it would require adding extra fill to widen the railroad embankment and widening both tunnels 4 meters (12 feet), an extraordinary additional cost.

Table 3-1
Potential Phase 2 Shuttle Operation Schedule

| Train 1 | | Capacity | |
|---|---|---|---|
| Trip | Time | Veh. | Coach Pass. |
| 1. Dep. Whittier | 6:00 am | 39 | 290 |
| Arr. Portage | 6:25 am | | |
| Dep. Portage | 7:00 am | 39 | 290 |
| Arr. Whittier | 7:25 am | | |
| 2. Dep. Whittier | 8:10 am | 39 | 290 |
| Arr. Portage | 8:35 am | | |
| Dep. Portage | 9:10 am | 39 | 290 |
| Arr. Whittier | 9:35 am | | |
| 3. Dep. Whittier | 10:20 am | 39 | 290 |
| Arr. Portage | 10:45 am | | |
| Dep. Portage | 11:20 am | 39 | 290 |
| Arr. Whittier | 11:45 am | | |
| 4. Dep. Whittier | 12:30 pm | 39 | 290 |
| Arr. Portage | 12:55 pm | | |
| Dep. Portage | 1:30 pm | 39 | 290 |
| Arr. Whittier | 1:55 pm | | |
| 5. Dep. Whittier | 2:40 pm | 39 | 290 |
| Arr. Portage | 3:05 pm | | |
| Dep. Portage | 3:40 pm | 39 | 290 |
| Arr. Whittier | 4:05 pm | | |
| 6. Dep. Whittier | 4:50 pm | 39 | 290 |
| Arr. Portage | 5:15 pm | | |
| Dep. Portage | 5:50 pm | 39 | 290 |
| Arr. Whittier | 6:15 pm | | |
| 7. Dep. Whittier | 7:00 pm | 39 | 290 |
| Arr. Portage | 7:25 pm | | |
| Dep. Portage | 8:00 pm | 39 | 290 |
| Arr. Whittier | 8:25 pm | | |
| 8. Dep. Whittier | 9:10 pm | 39 | 290 |
| Arr. Portage | 9:35 pm | | |
| Dep. Portage | 10:10 pm | 39 | 290 |

| | | | |
|---|---|---|---|
| Arr. Whittier | 10:35 pm | | |
| Total Daily Capacity | | 624 | 4,640 |

| Train 2 | | Capacity | |
|---|---|---|---|
| Trip | Time | Veh. | Coach Pass. |
| 1. Dep. Whittier | 7:05 am | 39 | 290 |
| Arr. Portage | 7:30 am | | |
| Dep. Portage | 8:05 am | 39 | 290 |
| Arr. Whittier | 8:30 am | | |
| 2. Dep. Whittier | 9:15 am | 39 | 290 |
| Arr. Portage | 9:40 am | | |
| Dep. Portage | 10:15 am | 39 | 290 |
| Arr. Whittier | 10:40 am | | |
| 3. Dep. Whittier | 11:25 am | 39 | 290 |
| Arr. Portage | 11:50 am | | |
| Dep. Portage | 12:25 am | 39 | 290 |
| Arr. Whittier | 12:50 am | | |
| 4. Dep. Whittier | 1:35 pm | 39 | 290 |
| Arr. Portage | 2:00 pm | | |
| Dep. Portage | 2:35 pm | 39 | 290 |
| Arr. Whittier | 3:00 pm | | |
| 5. Dep. Whittier | 3:45 pm | 39 | 290 |
| Arr. Portage | 4:10 pm | | |
| Dep. Portage | 4:45 pm | 39 | 290 |
| Arr. Whittier | 5:10 pm | | |
| 6. Dep. Whittier | 5:55 pm | 39 | 290 |
| Arr. Portage | 6:20 pm | | |
| Dep. Portage | 6:55 pm | 39 | 290 |
| Arr. Whittier | 7:20 pm | | |
| 7. Dep. Whittier | 8:05 pm | 39 | 290 |
| Arr. Portage | 8:30 pm | | |
| Dep. Portage | 9:05 pm | 39 | 290 |
| Arr. Whittier | 9:30 pm | | |
| 8. Dep. Whittier | 10:15 pm | 39 | 290 |
| Arr. Portage | 10:40 pm | | |

| | | | |
|---|---|---|---|
| Dep. Portage<br>Arr. Whittier | 11:15 pm<br>11:40 pm | 39 | 290 |
| Total Daily Capacity | | 624 | 4,640 |

Note: the capacity shown here is the capacity of alt. 2 as it was configured to meet daily rail demand. The capacity could be increased, but the demand is not expected to increase to fill any additional capacity.
(from here up-shade it)

Estimated total project cost for the improved railroad shuttle alternative is $27.5 million. Cost estimates include all items required to upgrade the existing track, install signals and switches, upgrade the existing tunnels, improve staging areas, and purchase or rehabilitate the train rolling stock.

vehicles, but other problems associated with the inconvenience of using the current shuttle would still exist. For example, the average travel time and loading time in 1997 would be cut by 15 minutes, while the road alternative would cut that time by 55 minutes. In addition, passengers would still be required to load and unload luggage and vehicles, board and step off trains in inclement weather, plan travel around the train schedule, leave vehicles at the Portage staging area where vandalism is a concern, and be constrained by limited winter service.

Although only a portion of the travelers to Whittier actually need a vehicle while they are in Whittier, only alternatives 3 and 4 would substantially satisfy the need for improved convenience as demonstrated by table 3-5.. Motorists would never have to leave their cars and there would be no need to load and unload gear between origin and destination. Alternative 4 would be slightly more convenient in terms of

time savings, because the wider tunnel and resultant higher capacity would mean that, at some time, waits would be slightly less. Virtually all travelers to Whittier come by automobile or tour bus to Portage, so extending the road *to get to* Whittier is naturally more convenient for them than the railroad, even though the need for a vehicle to get around *within* the city of Whittier is limited.

*3. User Cost.* The "Economic Analysis of Whittier Access Alternatives" technical report (Northern Economics 1995), which was prepared in response to comments on the draft environmental impact statement, included a thorough analysis of revenues needed to cover operations and maintenance costs of the various alternatives. The report assumed that user costs wold cover operating and maintenance costs based on trip projections for the various alternatives. To set prices such that ridership would still cover operations and maintenance costs, subsidies would be required for alternatives 1 and 2.

The report indicates that the per-person average user cost could actually drop by 51 percent by 2015 under the no-action alternative. This would be a result of greater numbers of people taking the train and thereby spreading the operations and maintenance costs over a greater number of users. This could represent a cost savings over today's fares, but translating this average per-person cost to train fares still suggests a family of four without a vehicle would face high costs of approximately $64 in 1997 and $47 in 2005. And, as noted, these user costs would come at the expense of a subsidy. Costs shown in the technical report were set at a level that would attract the greatest number of paying drivers or riders. Based on this demand curve, it is not possible to raise ticket prices under alternatives 1 or 2 enough to cover operations and maintenance costs (that is, as prices were raised, the number of riders would fall, ultimately decreasing revenues). Therefore, the rail options would require subsidies of $0.5 million per year for alternative 1 and $1.5 to $2.5 million per year (depending on

the operating scenario) for alternative 2, between 1997 and 2015. This subsidy could come from public funds or could be a subsidy provided by the Alaska Railroad. In 2015, the subsidy for alternative 2 would equate to $3-$5 per rider (again, depending on the scenario).

Finally, because of the limited length of the siding, increasing the number of coaches to accommodate ridership would require decreasing the number of flatcars. Thus, space to accommodate vehicles and boats on trailers would decrease, and the costs to transport them could increase because of the increasing competition for space. This would further increase the cost for anyone needing to transport a vehicle or trailer on a flatcar.

Under the road alternatives, it is likely that passage through the tunnel would require payment of a toll. A study by Northern Economics (1993) has shown that tolls, round trip, would likely be $10 or less to cover maintenance and operation of the road and tunnel. The cost of driving the additional distance between Portage and Whittier (about 26

miles round trip) would be $2.34, at a typical cost of $.09 per mile. The total cost per car would then likely be about $12 round trip. This would be approximately equal to the current shuttle cost for a single adult walk-on passenger ($16 summer or $10 winter) but would be a substantial savings for a family or anybody needing to take a vehicle or tow a trailer through the corridor. Note that this comparison includes costs only of driving round trip between Portage and Whittier. Costs for renting a car and so on are not included, because virtually everybody using any of the alternatives would use a car to get from their origin to Portage. Parking fees in Whittier are not included because it would not be required that drivers park, and it is not clear there would be a charge for parking.

Table 3-6 shows the average user costs per round trip throughout the 20-year life of the project. These costs were developed through an analysis of how user costs affect the number and frequency of trips to Whittier. The analysis determined a combination of user costs and trips which

resulted in the minimum amount of revenues to cover operation and maintenance costs for the alternatives. The average costs allow a relatively simple way to compare between the alternatives.

Table 3-6

Average User Cost Per Round Trip

1997-2015

| | Alt. 1 | Alt. 2 | Alt. 3 | Alt. 4 |
|---|---|---|---|---|
| average cost per user | $13.48 | $7.90 | $1.44 | $1.52 |

Note: alternative 2 assumes a subsidy of approximately $6.00 per round trip; if the actual subsidy varies, user costs will also vary.

Source: Northern Economics. January 1995.

As shown, the average cost to users over the life of the project is more than five times lower for alternative 3 than for alternative 2. Alternative 3 would be slightly less expensive than alternative 4. Note that translating these average costs into actual fares would likely result in a variety of fares for the railroad, including group discounts, lower

generate a profit for the railroad. The road options could also include a variety of tolls, including differing prices for frequent users, carpools, large trucks, and so on. These average per person costs do indicate, however, that all categories of fare or toll would likely be much less for the road options than for the rail options, with alternative 3 the lease expensive per user.

*4. Safety.* Safety improvements under alternative 2 would include adding communications and lighting systems and adding a tunnel ventilation system. Improvements in safety could be slightly compromised by the addition of a second train running in the opposite direction on the same track (see subsection 5.2.6. "Transportation and Infrastructure"), but advanced signaling and communications is proposed to make this operation as safe as any rail operation in the world.

corridor – each is somewhat misleading and together construct a contrived picture of "minor" impacts when a more realistic evaluation according to the criteria in table 5-1 would argue at least "moderate" impacts in the corridor near the visitor center and in Bear Valley. In fact, other parts of the DEIS ascribe higher resource values to these areas and greater impacts with alternatives 3/4 and are inconsistent or contradictory with the above statements.

Section 4(f) (7-13) The joint auto-train tunnels alternative is rejected in the Alternatives section and here, among other reasons for providing less capacity than is achieved with alternatives 3/4. However, given the major indirect effects associated with the large capacity increase with alternatives 3/4, less capacity with the joint auto-train tunnels could possibly be considered an advantage and favorable compromise. Given the alternative's greatly reduced 4(f) impacts, the FEIS needs to further analyze this alternative, with its staging area moved farther west to avoid high avalanche danger or other major environmental impacts, and

with avalanche protection measures analyzed for the portal #4 entrance.

Section 4(f) (7-14) The discussion of Alternative 2 indicates it has "unique factors" affecting its prudence, due to the use of 14 acres of wetlands near the existing staging area for a new rail loop and staging area expansion. This discussion is accurate in stating that Section 404 requires that there be no practicable alternative to the proposed work in wetlands (i.e. alternatives 3/4 as advanced here). However, in the analysis of practicable avoidance alternatives, Section 404 does not require that a more environmentally damaging alternative be implemented to avoid wetland impacts. It is clear that alternatives 3/4 are more damaging to 4(f) resources, and it is again misleading to label the wetland impacts of alternative 2 as "unique factors" (warming up to the Supreme Court reference to "unique problems" with section 4(f) avoidance alternatives), when similar wetland impacts are incurred regularly on other Alaska projects without such overemphasis. In addition, if concern is high enough about

the wetland impacts of Alternative 2, the DOT should have properly proposed mitigation/compensation for such impacts. The FEIS needs to present a more objective analysis and include appropriate mitigation commitments to address wetland impacts. The other biased comparisons between Alternative 2 and Alternatives 3/4 in the 4th and 5th paragraphs of this page also need to be less biased. Similarly at the top of 7-16, the DEIS attempts to overstate the impacts of the limited improvements of Alternative 2 in Bear Valley, while the larger scale impacts of improvements with alternatives 3/4 in Bear Valley are discounted as "minor."

Section 4(f) This 4(f) situation is complicated and is a good example why section 4(f) training is recommended. Since Alternative 2 is included in the DEIS as a reasonable alternative, that label implies (at least) that it sufficiently meets the project purpose and need; similarly, its inclusion in the 4(f) evaluation implies (at least) that it is also a feasible and prudent alternative. The earlier comments concerning potential funding of alternative 2 and wetland

impacts/mitigation of alternative 2, 3, and 4 need to be addressed. If Alternative 2 remains the less damaging reasonable and feasible/prudent alternative then Section 4(f) requires it be selected. Only truly unusual factors or costs or community disruption of extraordinary magnitude (Supreme Court's words, emphasis added, and from 23 CFR 771.135 (a)(2)) would constitute grounds to not select Alternative 2. The DEIS currently does not adequately make the case that Alternative 2 is not a reasonable or feasible and prudent alternative. The FEIS will need to designate Alternative 2 as the preferred alternative unless all engineering and environmental factors together plus strong agency and public input convincingly demonstrate that truly unusual factors and problems of extraordinary magnitude exist with Alternative 2.

In order to expedite review of the FEIS/4(f), we request that changes made to the text of the document between the DEIS and FEIS, be highlighted on the page margins where they occur.

/s/Carl S. Armbrister

Attachment

For purposes of this ~~D~~EIS, it is assumed that the no-action alternative (alternative 1) would have no capacity improvement. The Alaska Railroad has no plans to improve capacity, although improving capacity to a limited degree is possible by adding more flatcars or passenger coaches to the current train or adding one or more trips in a day. But the capacity improvements that are possible, given the limited length of the track siding used to load and unload the shuttle and given current operation, are minimal and would not satisfy projected demand for access.

Projected demand forecasts were made to project two types of demand: rail demand and corridor demand. Because projected demand for access is in part based on price and convenience, the current rail shuttle, at current prices and level of convenience, would never develop a great deal of demand. The projected demand that *would* develop from rail access has been termed "rail demand." Projected demand that would be generated with the most convenient access

with least possible expense to the user has been termed "corridor demand." This is essentially equivalent to the demand expected if there were road access with no toll. Projected corridor demand is far greater than the current shuttle could ever expect to generate. Demand figures are drawn from "Whittier Access Improvements: Economic Assessment" (Northern Economics, December 1993). That document explains the methods used to arrive at the demand projections. [~~Because projected demand for access is in part based on price and convenience, alternative 2 would not develop the same level of projected demand as would be generated under alternative 3 or 4; because the rail alternative would be less convenient and more expensive, fewer people would be willing to use it. The projected demand that would develop from rail access has been termed "rail demand." Projected demand that would be generated under more convenient access with less expense to the user has been termed "corridor demand." Projected corridor demand and capacity for the design hour given as one way~~

~~trips are shown in Table 2-1. The design hour volume is that hourly volume which is projected to be exceeded only 15% of the time. The information in the table demonstrates that projected corridor demand for access to Whittier in the corridor exceeds the capacity of the current shuttle~~.] Under alternative 1 in 1997, the shuttle has a capacity of 615 ~~465~~ people per hour (one-way trips), but design hour projected corridor demand indicates ~~1,100~~ 1,310 people would like to go to Whittier ("design-hour" traffic is near-peak, or traffic levels expected to be exceeded only 15 percent of the time). This shows a shortfall in capacity during peak times by more than half. Projections on an annual basis also show that corridor demand is far greater than the capacity of the current shuttle. Based on survey results compiled by Northern Economics (December 1993), 91,000 visitors would want to use the current shuttle in 1997, while more than 897,000 would want to travel back and forth between Whittier and Portage in that year under a minimum-price and minimum-inconvenience scenario. Projected demand is similarly not

met in 2015. Chapter 3.0 compares the ability of the different alternatives to meet corridor demand. [~~The information in the table 2-1 demonstrates that projected corridor demand for access to Whittier in the corridor exceeds the capacity of the current shuttle~~.